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CURRENT TOPICS.

IN A LATE CASE (Meader v. White, 4 Am. L. T. Rep. 238), the Supreme Court of Maine decides that a loan of money, made on Sunday, is void, and that, whether the promise to repay be in writing, verbal, or implied, it can not be enforced; citing Finn v. Donahue, 35 Conn. 216; Plaisted v. Palmer, 63 Me. 576. The amount borrowed by the defendant was nine dollars, and the opinion of the court, nonsuiting the plaintiff, is a warning against liberality on the Sabbath. "The moral obligation to repay money loaned is the same," says Appleton, C. J., "whether the loan be made on one day or on another. It is an unfortunate condition of the law, when the violator of its commands is rewarded by it for such violation. The defendant and the plaintiff are alike guilty of a violation of law,—the former in soliciting a loan, the latter in yielding to such solicitation. Both are liable to the penalty provided by the statute. But the defendant, while guilty with the plaintiff and equally amenable to the penalties provided by the statute, is rewarded for his wrong-doing by the refusal of the law to aid in the enforcement of a debt justly due. He is absolved from an indebtedness created at his own instance; while his associate in guilt, who yielded to his wishes, is liable to a double penalty,—that inflicted by the law, and that arising from the non-payment of money loaned,—in addition to the sorrows of a regretful conscience. Juvenal indignantly says:

'Multi committunt eadem diverso crimina fato;
Ille crucem pretium sceleris tulit, hic diadema.'

So, now, of two criminals guilty of the same offense, one is punished and the other rewarded by the law which creates the offense."

A NEW YORK journal states that one of the most respected physicians of that city, who a few years ago was worth over $100,000, and who has devoted his time and money to deeds of charity, now occupies a cell in the city jail, having been imprisoned for a debt of $100. Imprisonment for debt is a relic of a very different order of things from that which prevails in this country at this day. It has been abolished so long in England, that to speak of it recalls a time when the civil and criminal laws were a crying shame. But, though both were unjust, they were at least consistent. Stealing was considered more heinous than owing a debt without possessing the means to pay it, and so thieves were hanged, while debtors were only sent to jail. But, as the criminal laws were altered, the laws relating to debtors received a like modification, and imprisonment for debt is now unknown, not only in England, but in nearly every state in the Union. Where it still lingers, as in New York, this extraordinary result follows,—that while there is a limit to the punishment awarded to a criminal, a debtor's imprisonment is often perpetual. Had this New York physician stolen $100, he would have been a free man in a year or two at the most, perhaps even at the end of a couple of months; but, being called upon to do an impossibility,—to pay a sum of money which he does not possess, and which, his liberty being restrained, he can not hope to acquire,—his release becomes really hopeless. There are unfortunate debtors in the city of New York, we are told, who have not been outside of their prison bounds for twenty days in twenty years. And this, while the murderer of Fisk serves out his allotted term and is a free man, and the robbers of millions from the public treasury walk the streets without molestation.

THE results of a year's experience of the abolition of the death penalty in Maine are not such as to give the opponents of capital punishment very much ground on which to found an argument in support of their ideas. A correspondent of the New York Nation, writing from that state. gives some facts in relation to the abolishment of hanging, which are calculated to strengthen the opinion that the fear of a criminal for his own life is the most deterring influence in preventing him from taking the life of another. Maine was admitted into the Union in 1820, and began its existence as a state with a capital-punishment law. In 1837 this law was amended, so as to leave its execution optional with the governor. The governor very rarely awarded the extreme penalty, and, as a consequence, murders increased to such an extent that "in 1860 Maine had become notorious for its murders." Nevertheless, from 1834 to 1884, a period of thirty years, not an execution took place in that state. "At length," says the writer, "a state-prison convict, perhaps emboldened by this neglect, murdered his warden, and for this act, singularly enough, he was hung by Gov. Corry, as if the slaying of a prisoner's natural enemy were a more atrocious crime than the murdering of a wife or a friend. So illogical an enforcement of the capital law, of course, produced little effect, and murdering went on, until, in 1869, Gov. Chamberlain executed Harris, a negro, for the murder and rape of two old women. But his successor, Gov. Perham, refused to enforce the law, and capital crime soon proceeded more rapidly than ever, until, in 1875, the legislature passed an honest law, restoring the death-penalty without evasion, and in June of that year Wagner and Gordon were hung for the murder of five or six victims—men, women, and children." The effect of the new law and its strict enforcement is very striking. During the entire year following its passage, only one homicide occurred in Maine, and in that case the murderer committed suicide immediately after the commission of his crime. Yet in the face of this the legislature of 1876 abolished capital punishment, and the result of one year of the law of

1876 is even more striking than the effect of the passage of the law of 1875. Barely a year has elapsed since the last law was adopted, and in that time no less than eleven cruel and unnatural murders have been committed in the state. In addition to this, says the writer, "another alarming result of the abolition of the death-penalty has been a startling increase of high crimes not capital. During the year 1876, the number of our state-prison convicts has risen from 148 to 171, a gain of nearly sixteen per cent.; and the last legislature, in February, was obliged to appropriate $15,000 towards an enlargement of the prison, although sixty-eight convicts had been removed from it to fill jail workshops, built within the past three or four years, at a cost of over $60,000, to accommodate prisoners sentenced for not more than three years." Facts like these should be carefully studied by our legislators. They are of more value in the consideration of the advisability of capital punishment than any amount of false sentimentality or dangerous lenity, and point to the conclusion that the gallows can not be abolished with safety to society.

THE Missouri Legislature, after having been in session for several months, has adjourned for two years, unless specially summoned in a case of emergency before that time. During its sittings it has passed over a hundred laws on every variety of subject, from a bill to abolish the state entomologist, to an act to encourage the destruction of rats. No one can fail to be struck with the versatility which it has exhibited in dealing with so many important and difficult topics. Every question with which it has undertaken to deal, whether legal, commercial, agricultural, or social, it has dispatched with a celerity which is truly startling, and with the same ease and dexterity with which an accomplished gambler is able to deal out a hand at cards. If the labors of a legislative body are to be judged by its works, and if its works are to be measured by the ream, we may search in vain for a congress or a parliament which can be spoken of as the equal of our legislature. We have obtained the laws which it has enacted, as they received the signature of the governor, and are at present making an heroic attempt to publish them for the benefit of our readers in this state. Our table groans under their weight, and we are not certain that all of them have been sent to us, either. We have likewise received the acts passed by the Illinois Legislature, which is at present in session, and we are therefore able to state that, in the work of making laws, Missouri is ahead of Illinois by at least ten to one. The United States Congress can never hope to rival us; for though it has a somewhat larger constituency for which to legislate, we are certain it never, in its longest session, was capable of such endurance and performance. The British Parliament is so far behind as to be hardly worth the comparison; for while it contains not a few men of great and world-wide reputation, and has been in session for months, it has thus far passed in all but six acts. Under these circumstances it may well be doubted whether the hundred and more statutes, which are now incorporated into the laws of this state, have received that careful thought and consideration which should precede the adoption of all laws which are to govern a community, and which every citizen is to be called upon to obey. We have seen no evidences that they have. Day after day, our city journals have recorded the provisions of statutes which have been introduced or adopted, but hardly a word to show that they had been discussed and debated. At the opening of the celebrated Long Parliament, in 1640, a resolution was moved and carried, that a certain over-talkative sergeant-at-law should hold his peace, and the subsequent proceedings of that assembly prove that he obeyed the command. This has been since cited as a valuable precedent for the restraint of long-winded orators. Whether such an order, more extensive in its scope, was passed at the opening of the late legislature, we do not know; but, at all events, the people of this state can not complain that their representatives have done nothing but talk.

A TELEGRAPH COMPANY is liable for loss arising from negligence in sending a message delivered to it, and an action for damages resulting therefrom may be maintained by the party to whom the message was addressed. This is the law as held in the courts of this country. See Elwood v. Western Union Tel. Co., 45 N. Y. 549; New York & Washington P. T. Co. v. Dryburg, 35 Penn. St. 298; Rose v. United States Telegraph Co., 6 Rob. (N. Y.) 305; West. Un. Tel. Co. v. Carew, 15 Mich. 525; Sedgwick on Damages, 445. "It is true," says Mr. Wharton (Whart. on Negligence, § 758), "that this point has been disputed in England, in Playford v. U. K. Tel. Co., L. R. 4 Q. B. 706; but it has been in this country maintained, and with justice, because the company is the agent both of the sender and the receiver; and on the principle, *sic utere tuo ut alienum non laedas*, if it undertakes to exercise a franchise, it must do so in a way which may not injure others." The doctrine of the English case referred to in this quotation has very recently been re-affirmed in the case of Dickson v. Reuter's Telegraph Co., L. R. 2 C. B. D. 62. Here the plaintiffs were merchants carrying on business at Valparaiso, being a branch house of a firm carrying on business at Liverpool. The defendants were the well-known telegraph company. In December, 1874, the defendants had an agency at Monte Video, but not at Valparaiso. Previous to December, 1874, the plaintiffs' Liverpool firm were in the habit of sending messages to the Valparaiso firm through defendants' company, and were instructed by defendants to head such messages by the registered cipher word "*Felix*," indicating that the messages were intended for plaintiffs' Valparaiso firm. The plaintiffs' Liverpool firm accordingly so headed their messages. In Decem-

ber, 1874, plaintiffs received at Valparaiso a telegraphic message, which had been transmitted by the defendants from Monte Video, in the following words: "Dickson Bennett—Valparaiso—London—24—ship—distilling—barley—steamer—36—cost—freight—quarter—420—pounds—34—sailing—stop—nitrate—silver—5712—remit—Dickson—Liverpool—Havas—M. Video." This telegram, when interpreted, was as follows: "To Dickson, Bennett and Co., Valparaiso, a message dispatched from London, the 24th instant—Ship distilling barley by steamer at 36s. cost and freight per quarter of 420 lbs., or 34s. by sailing vessel. Stop purchases of nitrate, silver 57½ pence per ounce. Remit—From Dickson, Liverpool, through Havas, Monte Video." This telegram was never intended to be sent to the plaintiffs, nor was it intended for the plaintiffs; the mistake arose from a confusion between the cipher used—the word *Felix* was put instead of *Faber*. *Faber* was the cipher used by the firm at Valparaiso, for which the telegram was really intended. The plaintiffs, thinking this was an instruction to them to purchase, made investments accordingly, the result of which was that they lost a very considerable sum, which they sought to recover from the defendants. The court held that the plaintiffs could not recover, relying upon the former decision in Playford v. U. K. Tel. Co. "This would," said Lord Denman, referring to the plaintiffs' argument, "in our opinion, be imposing a liability upon telegraph companies, inconsistent with the real understanding of mankind as to the duties they undertake and the liabilities they incur, and practically extending the primary undertaking of the company with the sender of a message into an implied undertaking with all mankind, to guarantee everybody against the consequences of the delivery of a message to the wrong party through any negligence of any one of their servants employed in the transmission of a message to the remotest part of the world." The Irish Law Times, in an editorial in a late issue, criticises this ruling at considerable length, and maintains that the rule adopted in this country should have been followed by the English court. "It is manifest," says that journal, "that in a large majority of cases telegrams are of more importance to the receiver than the sender; the receiver is the person who is usually set in motion by the receipt of the telegram; and, if it is not to be laid down broadly that telegraphic companies are not to have a perfect immunity for the negligence and often gross carclessness of their employees, we can see no reason why the really injured person should not have a remedy. Such a decision as the present is contrary, manifestly, to public policy, and fraught with very disastrous consequences to the public, as the telegraphic companies, now that they are insured by the decision of the Common Pleas from the consequences of their negligence, will probably allow themselves even greater latitude in making the absurd mistakes of which they are constantly guilty."

THREATS AND OTHER DECLARATIONS OF THE DECEASED AS EVIDENCE IN CASES OF HOMICIDE.

In our issue of April 13, *ante*, p. 348-354, a decision on this subject by the Supreme Court of the United States is given, together with an appended note. It is Wiggins v, People, on error to the Supreme Court of Utah. There are some difficult questions connected with this subject, and some upon which the courts are not quite in harmony. Our readers, therefore, will excuse us if we here resume the discussion, and perhaps carry it to greater length than, but for the difficulties attending it, might seem desirable.

1. *Threats made by the Deceased prior to the Conflict, and communicated to the Person accused.*—If, on a trial for homicide, it is a question whether the killing was murder, or manslaughter, or was justifiable in self-defense, the defendant may show that, before the encounter, the deceased had made threats against his person or life, and those threats had been communicated to him; "as tending," said Coleman, J., in an Alabama case, "to show, that, in the assault on the deceased, he may have acted under a just fear of danger to his own life." Powell v. The State, 19 Ala. 577, 581; S. P. Pitman v. The State, 22 Ark. 354, 357; Dupree v. The State, 33 Ala. 380; Hudgins v. The State, 2 Kelly, 173, 181; Williams v. People, 54 Ill. 422; 2 Bishop Crim. Proced., 2d Ed., § 630. And see Pritchett v. The State, 22 Ala. 39. In the cases which have arisen, the threats have been recent; and the judges, in laying down the proposition that they are admissible, have generally qualified it by the adjective "recent." In reason, if the threat is so old that it may be presumed to have been abandoned, it ought not to be admitted; but in reason, and pretty plainly on the authorities, it need not be so fresh as to constitute a part of the *res gestæ*. If what the prisoner knew of it may be presumed to have influenced his act, that should be deemed sufficient.

2. *Declarations and Threats, with Acts of the Deceased, as parts of the Res Gestæ.*—What, in the general law of evidence, is to be regarded as of the *res gestæ*, is a question difficult to answer in a single sentence. Greenleaf says: "The surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." 1 Greenl. Ev. § 108. Now, a murder, or other homicide, is not always committed in an instant, or on a single day; but often the transaction which ends in death extends through a series of days, or even of months. And, while the transaction is in progress, what is said by one or both of the parties to the conflict will, if the other necessary circumstances concur, be deemed of the *res gestæ*. Therefore, threats by the deceased, or other declarations by

him, when duly connected with any part of the transaction which resulted in death, may be shown in evidence by the prisoner in his defense. Pitman v. The State, 22 Ark. 354; People v. Arnold, 15 Cal. 476; Monroe v. The State, 5 Ga. 85; Williams v. People, 54 Ill. 422; Campbell v. People, 16 Ill. 17; Dixon v. The State, 13 Fla. 636; The State v. Sloan, 47 Misso. 604; and other cases to be cited as we proceed. What state of facts brings a case within this principle, and what does not, is the question of difficulty. In England, not long ago, a man was tried before Mr. Justice Quain for the murder of his wife. Evidence was given tending to show that he often beat her, and he killed her with a poker. It was then testified against him, that, a week before the killing, the wife came to the house of the witness with a carving knife and a large axe. And it was then made a question, whether or not the witness might state what she said. The learned judge admitted the evidence, which was: "She said, 'please to put them up, and when I want them I'll fetch them; for my husband always threatens me with these, and when they're out of the way, I feel safer.'" Reg. v. Edwards, 12 Cox C. C. 230, 4 Eng. Rep. 518. Mr. Moak has attached to this case, as reprinted in 4 Eng. Rep., a note in which he questions, on a considerable collection of authorities, the correctness of this decision. The report of the case is brief; but, assuming that a series of threats and assaults had been shown, extending down to the time of the fatal blow, making the evidence that the woman carried the knife and axe to a neighbor's house admissible as a part of the connected series, it seems to us that what she said while performing this act was of the *res gestæ*, and therefore properly admissible. But it would not be permitted to introduce against the prisoner any such mere words, unconnected with any act. So it was held in Indiana, as to mere declarations of the deceased; the court, by Pettit, J., observing: "We think the books may be searched without success, to find a case where the statements of a murdered man, made before he came in sight or hearing of his slayer, can be given in evidence against the accused on his trial." Cheek v. The State, 35 Ind. 492, 494. This may be putting it strong; but, in substance, the statement is doubtless correct as applied to facts of the sort then in the contemplation of the learned judge. And, on the same principle, in a murder case in Connecticut, where the deceased was an aged woman, with whom the prisoner was living as her hired man, and she had been found dead near the house in a pool lying on her face, and the theory of the defense was that she had fallen into it in a fit, evidence was rejected of her declaration made about a year before, that she was subject to fits, and had several times fallen on her face when taken with them. "Hearsay evidence," said Sanford, J., "is not admissible merely because in the particular case no better can be had." The State v. Dart, 29 Conn., 153, 156. So the courts have rejected the declarations of a deceased wife, for the murder of whom the husband was on trial, that she had been guilty of adultery, The State v. Rash, 12 Ire. 382; also, declarations of the deceased that he was afraid another person than the prisoner would kill him. The State v. Patrick, 3 Jones (N. C.) 443. And if the declaration is made in connection with an act, it is not admissible, unless the act also is pertinent to the issue. People v. Williams, 3 Abb. Ap. Dec. 596. And see the State v. Harris, 59 Misso. 550.

If two persons, each in the absence of the other, prepare for a hostile encounter, and, on meeting, one of them is killed, the preparations would seem in reason to be parts of the one transaction. Then, on a trial for the homicide, the declarations of the respective parties, while making the preparations, would appear to constitute parts of the *res gestæ*. In proper circumstances, therefore, why should they not be admissible? Thus, in a California case, it appearing that the deceased had a pistol, the defendant was permitted to prove what he said at the time of procuring it. "This declaration," observed Baldwin, J., "being made at the time of procuring the weapon, was a part of the *res gestæ*, and illustrative of the transaction. * * * * We apprehend that, if a man goes into a house, borrows a gun, goes out with it, saying that he means to use it on another, and a rencounter happens between him and the other, and the witnesses who see the difficulty differ, or the circumstances are equivocal as to which one commences the affray, some light might be thrown upon this question conducing to or towards its solution, by the proof of these facts as to A, his procuring it and his motives in doing so." People v. Arnold, 15 Cal. 476, 481, 482. So, in another California case, where, on the day of the homicide, the deceased exhibited to a witness a pistol which was present at the affray, the witness was permitted to testify to threats made by the deceased against the defendant at the time of the exhibition, though not communicated to him. This decision was placed on the same ground as the other. And the doctrine appears to be, that, the exhibiting or procuring of the pistol being a part of the transaction which ended in death, so likewise was what the man said while exhibiting or procuring it; all was of the *res gestæ*. But this sort of testimony is, like any other, admissible only when relevant to the issue. It would not in every case be relevant; therefore it would not be admissible in every case. To explain which, Crockett, J., said: "If a deadly rencounter occurs between two persons, in which one is killed, and if the survivor claim that he acted in self-defense, the evidence of those who witnessed the transaction may leave it in doubt which of the two was the assailant. There may even be very slight proof that the deceased was the aggressor; and yet if it be established that, shortly before the affray, the deceased armed himself with a deadly weapon, declaring, with apparent sincerity and earnestness, that he had procured it with a fixed determination to take the life of his adversary on sight, it can not be denied that

this would tend in some degree to corroborate whatever other evidence there was tending to show that the deceased was the assailant. Of itself, and unsupported by other facts, it might, and probably would, be deemed wholly insufficient to establish the fact proposed. Nevertheless, it would constitute an item of proof, tending, it might be slightly, but still in some degree, toward the conclusion proposed to be established. The weight to be attached to it is for the jury to consider, in connection with the other proofs; and it would be the duty of the court to explain to the jury carefully, that the proof was admitted only as tending to corroborate whatever other evidence there was that the deceased was the assailant, and for no other purpose." People v. Scoggins, 37 Cal. 676, 686. A case like these, as respects the facts, was that of Wiggins v. People, decided by the Supreme Court of the United States, mentioned at the opening of this article. If there was anything amiss in this case before the latter tribunal, it was that the respective counsel concurred in a proposition of law quite different from this, and, it is believed, unsound; so that the court was practically precluded from looking into the true legal doctrine. For further cases relating to this question, see The State v. Jackson, 17 Misso., 544; Holler v. The State, 37 Ind. 57; Kirby v. The State, 9 Yerg. 383; Carroll v. The State, 3 Humph. 315; Bassham v. The State, 38 Texas, 622; Campbell v. People, 16 Ill. 17; Keener v. The State, 18 Ga. 194; Lingo v. The State, 29 Ga. 470.

Again, if there is a series of threats made by the deceased, so blended as to be inseparable, and the last one is accompanied by such demonstrations, or otherwise so connected with the final act, as to be admissible as of the *res gestæ*, the whole may be given in evidence. The State v. Sloan, 47 Misso., 604. And it is the same where some of the threats are admissible on the ground of having been communicated to the defendant; the whole may be shown. Cornelius v. Commonwealth, 15 B. Monr. 539.

If a man should say, "I am going to shoot A, for he has insulted me," then should reach out his hand, take a gun, and discharge it; or, if he should shoot first, and add: "I have shot A, for he has insulted me;" his words, in either case, would be as truly of the *res gestæ* as if spoken while his finger was drawing the trigger. But how long before or after an act may the words be spoken and still be of the *res gestæ*? The courts have never answered this question by a rule, and it is not probable they ever can. "At or about the time," or "near," or "shortly before," or "shortly after," or "immediately after," is as exact as they have come to the solution of the difficulty. Pitman v. The State, 22 Ark., 354; Campbell v. People, 16 Ill., 17; Reg. v. Johnson, 2 Car. & K., 354; Little v. Commonwealth, 25 Grat., 921; Hill v. Commonwealth, 2 Grat. 594; Reynolds v. The State, 1 Kelly, 222; Dixon v. The State, 13 Fla. 636; Burns v. The State, 49 Ala., 370; Reg. v. Lunny, 6 Cox C. C., 477. In one case it was held that a person indicted for murder can not give in evidence his own conversations, had after going half a mile from the place of the homicide. Gardner v. People, 3 Scam. 83. And see Caw v. People, 3 Neb. 357; Carroll v. The State, 3 Humph. 315; Denton v. The State, 1 Swan (Tenn.), 279.

3. *Threats not communicated.*—The general doctrine is plain and unquestioned, that the defendant can not introduce in his defense threats of the deceased against him, which were not of the *res gestæ*, and of which he had no knowledge at the time of the encounter. 2 Bishop Crim. Proced. 2d ed., § 630; The State v. Harris, 59 Misso. 550; Hudgins v. The State, 2 Kelly, 173; The State v. Dumphey, 4 Minn. 438; The State v. Jackson, 17 Misso. 544; Powell v. The State, 19 Ala. 577; Edgar v. The State, 43 Ala. 45; Atkins v. The State, 16 Ark. 568; Coker v. The State, 20 Ark. 53; The State v. Gregor, 21 La. An. 473; The State v. Ridgely, 2 Har. & McH. 120; People v. Garbutt, 17 Mich. 9; Rippy v. The State, 2 Head, 217; Newcomb v. The State, 37 Mississ. 383; The State v. Hays, 23 Misso. 287; Lingo v. The State, 29 Ga. 470. Most of the cases lay down the doctrine in these complete and full terms, without qualification or exception, and it is believed that such is the true law. But some legal persons, not distinguishing between what is of the *res gestæ* and what is not, have fallen into what seems to us to be an error. Thus, in the New York case of Stokes v. People, 53 N. Y. 164, there were several questions, upon a principal one of which the trial-court had committed a very palpable error, and the judgment could not be otherwise than reversed. See 3 South. Law Rev. (N. S.), 50. Among the main points it appeared that evidence of recent threats by the deceased had been offered at the trial on behalf of the accused. Some of these threats were communicated to the prisoner prior to the homicide, others were not. The question being one of self-defense and the other evidence not being deemed conclusive, the trial-court had admitted the communicated threats, but rejected the others. Was this rejection error? On the views already presented in this article it was; because the threats not communicated constituted with the others one series, and the admissibility of a part of the series carried the whole. But the judge who delivered the longer of two opinions, not adverting to this distinction, or the distinction between what is of the *res gestæ* and what is not, said: "Had the deceased, just previous to his going into the hotel, where the transaction occurred, declared that he was going there to kill the accused, and that he was prepared to execute this purpose [a supposition bringing the words within the rule of the *res gestæ*], we think the evidence would have been competent upon the question whether he had in fact made the attempt when that question was litigated. And yet [forgetting the entire doctrine of the *res gestæ*] there is in principle no difference between this and the testimony offered and rejected. The difference is only in degree." Stokes v. People, 53 N. Y. 164, 175. Another judge spoke only to another

question in the case, and the rest concurred. Evidently this temporary misapprehension of the learned judges, upon a minor point in a case which must necessarily be reversed on another ground, and even on this for another reason, should not be accepted as sufficient authority for making hearsay an element in the law of evidence, contrary to what has hitherto been accepted as fundamental in this department of our legal system. Yet such is the principal authority for a doctrine which a text-writer had laid down, and the counsel in Wiggins v. People on both sides had adopted, and to which therefore the court assented without any real examination. It is, that, "where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant; but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life." Now, there is no dispute that the deceased in a murder case is in the same position with any other third person whose statements, not given under oath, and not dying declarations, are mere hearsay. Commonwealth v. Densmore, 12 Allen, 535; People v. McLaughlin, 44 Cal. 435. But the new doctrine is, that this hearsay may be received to prove the "deceased's attitude." If "attitude" may be established by hearsay, what can not? Why, the new doctrine tells us what it is that can not; the "*quo animo* of the defendant" can not be shown in this way. But in all the cases in which this question arises, the "*quo animo* of the defendant" is the very gist of the inquiry. The question whether the deceased commenced the affray is relevant only as it helps the jury to determine the "*quo animo* of the defendant,"—whether his motive was self-defense, or bodily harm to the deceased. But, says the new doctrine, the defendant's *quo animo*—the only question to be passed upon in these cases, where the killing is admitted, and self-defense is set up—can not be shown by the new evidence. It is only to the "attitude" of the deceased, whether at the "time of the killing the *deceased* was seeking the defendant's life," that the evidence is addressed. Nothing against the *defendant* is to be deduced from it. Only the party whose case has been carried by death to the higher tribunal, and on which the jury is not permitted to pass, is to be affected by it. The form of the instruction to the jury, by the court, is to be, therefore, as follows: "Gentlemen, the killing by the defendant in this case is admitted. But he claims that he acted in self-defense, so that the killing proceeded from no evil purpose in him. And this is the question on which by your verdict you are to pass. You are to determine what was 'the *quo animo* of the defendant.' No other question presents itself, all else being admitted. What was 'the *quo animo* of the defendant?' In answering this question, you are carefully to exclude from your minds the testimony of the threats of the deceased. The law takes cognizance of the inquisitive nature of man, especially of jurors, and it has permitted this evidence to be introduced to you in aid of your contemplations of the 'attitude' of the deceased at the bar of Heaven. Be careful that it does not influence your minds on the question of your verdict."

It is submitted that this form of address to the jury would be a novelty in legal proceedings. Yet this is the new doctrine in exact shape, as presented to the court by the counsel on both sides, and, without consideration, accepted, because taken from a text-book. In this illustration of the doctrine, there is not a line drawn in caricature. But it is submitted, that it is not competent for counsel, even for prosecuting officers acting for the government, to overturn a pillar in our temple of the common law by an admission,—especially by an admission involving an absurdity. Let us, therefore, cling to the old rules of evidence till we find them wrong. As to the case itself, of Wiggins v. People, the high tribunal in which the decision was pronounced has furnished the rule. Said Miller, J., in Woodruff v. Parham, 8 Wal. 123, 138: "We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made." Plainly enough the absurdity we are contemplating was not in the mind of the court, nor was its effect on established law.

Concerning the Cases.—Most of the cases cited in this article may be found in Horrigan and Thompson's "Select American Cases on the Law of Self-Defense," with perhaps some not here cited. It is perceived that the English books are nearly destitute of instruction on this question. And those who examine the American decisions will discover that, on this question as on many others, the judges not unfrequently, little enlightened by arguments of counsel, and pressed by business blocking their courts, have been compelled to pronounce opinions less accurately considered than might seem desirable. Dispatch in judicial business is necessary in modern times, whether the parsimony which compels the courts to work with too few judges, and still to leave their business constantly in arrears, is so or not. What lawyer has not occasionally sighed for the good old days when, on a question of particular difficulty, the court could find time to listen to "solemn argument," from the most gifted counsel, three times in a single cause! Now they are compelled to run through their dockets as rapidly as possible, hear each case argued once, sometimes by gentlemen who have been able to spend in preparatory law-studies but a few months snatched from time mainly devoted to party-politics, limiting the arguments by a rule of court, and themselves necessarily therefore pronouncing opinions which are "limited"—perhaps not in length. The end of this evil is one which some will deplore and others not. Respect for judicial authority, which has

been for a good while on the wane among us, will continue to decrease; till, out of what some look upon as ruin, a just regard for true legal argumentation and sound doctrine will arise, and jurists will become, to the law, what judges have heretofore been. J. P. B.

RIGHT OF CREDITORS AND FAMILY OF LUNATIC.

IN RE ENGELN.

Louisville (Ky.) Chancery Court, April, 1877.

Before HON. H. W. BRUCE, Chancellor.

Unsecured creditors of a lunatic have no right to be satisfied out of the unencumbered estate of the lunatic, until a sufficient fund for the maintenance of himself and family during his life, or lunacy, has been set apart.

Otto A. Wehle, for the committee; *Byron Bacon* for creditors.

BRUCE, Chancellor:

In the proceeding 29,115, John Engeln was, by the verdict of a jury and the judgment of this court, ascertained to be a lunatic. Action 29,597 was instituted to procure a sale of real estate of the lunatic for the payment of his debts and the maintenance of the lunatic and his family. His family besides himself consists of a wife and three infant daughters, of the ages of about fourteen, sixteen, and eighteen years. His indebtedness amounts to about $36,000, and his estate to a larger sum, probably amounting to some $50,000. Much the larger amount of his indebtedness is secured by mortgage liens on his real estate. Some of the real estate has been sold, and purchase-money has been paid into court. Among his debts is a mortgage debt to Bissell of $20,000, secured by a mortgage lien on the lunatic's Market-street property, worth, it seems, certainly as much as, and probably considerably more than, the incumbent debt. This is a ten-years' loan, bearing interest at the rate of nine per cent., the principal of which does not mature until the 26th of February, 1882, provided the semi-annual interest be regularly and promptly paid, but the maturity of which may be precipitated by non-payment of such interest. Default has been made in the payment of the installment which fell due the 26th of February last. The net income from the mortgaged property is sufficient to pay the interest, and something more; but that income has been otherwise legitimately used, and there is not now enough of it on hand to pay said installment of interest. The committee moves now to have leave to withdraw $900 with which to pay said interest and carry said mortgage until the 26th of August next, under the belief that there will, by that time, be an improvement in the condition of the real-estate market here, and that a judicial enforcement of the mortgage lien after that time would not be so disastrous to the lunatic's estate and interests as an early enforcement of it would be. The court has had an investigation made by its commissioner of the facts upon which the committee's motion is based; and the commissioner's report and accompanying testimony sustain the committee's view.

The committee and wife of the lunatic petition the court to make provision out of his estate for the support of the lunatic and his family. Of course, this can not be done in such a way as to prejudice those creditors who have contract liens on his estate; and after the satisfaction of those liens the residue of the estate will be insufficient to pay now the debts of the unsecured creditors and provide a maintenance for the lunatic and his family; and hence the unsecured creditors object to the provision being made out of the estate, until the debts due from the lunatic to them shall have been satisfied. They also object to the motion to withdraw for the purpose of carrying six months longer the Bissell mortgage. These are the two questions now before the court for consideration:

1. As to the motion, I am satisfied, from the commissioner's report and accompanying evidence, that the lunatic's interest requires that the mortgage should be carried six months longer, and that to do so will probably redound to the benefit of the unsecured creditors, and that sustaining the motion will not prejudice them. Hence the exception to the commissioner's report is overruled, the report confirmed, and the committee's motion to withdraw for payment of interest is sustained.

2. The second question is more embarrassing. It is substantially this: Who have the first claim upon a lunatic's estate during his life and lunacy, he and his wife and infant children for a reasonable maintenance, or his unsecured creditors for the payment of their claims against him? This is the first time I have ever had to consider this question, and, so far as I can ascertain, the first time it has ever been presented to a Kentucky court. It is certainly a very interesting question; and, in view of the present frequency and variety of *non compos* inquests in this court, it is one of great importance, and is probably not now presented for the *last* time. No condition or station in life is exempt from the dire calamity which has fallen on John Engeln and his wife and daughters. It has been justly observed by Mr. Maddock: "Such is the perishable fabric even of the finest genius, that Lord Somers, the Duke of Marlborough, Dean Swift and Lord Mansfield, might at the close of their lives have been made the subject of such a commission." Indeed, the poet has sadly sung,

"From Marlb'rough's eyes the streams of dotage flow,
And Swift expires a driv'ler and a show."

It is true, the greater number of persons who are judicially ascertained to be *non compotes* are destitute of property, and they have to be supported by the state. When a debtor is ascertained to be of unsound mind, and has property, shall his property be taken by his creditors, and he supported by the state, or shall he and his dependent family, until emancipated by his death, be supported out of his estate, even if in consequence thereof the payment of his debts be postponed, or in part or in whole defeated?

Has a Chancery Court in Kentucky the power to administer the relief prayed for by the lunatic's committee and wife?

It has been contended that the power of the Lord Chancellor in England over such matters was derived solely from the King's sign manual, and that the crown derived its power from the statute, *De Prærogativa Regis* (17 Edw., 2), and consequently the Lord Chancellor's power was personal and not judicial; and this view has been accepted by many law writers. The contrary, however, seems the better opinion. Mr. Maddock (2 Chancery, 555) says: "The origin of the crown's authority over idiots and lunatics nowhere clearly appears. Lord Coke says the King had not this prerogative when *magna charta* passed, nor when Bracton wrote, but had it when Britton wrote, and for this he cites Fleta. "The better opinion seems to be that the right of the crown existed prior to the statute, *De Prærogativa Regis* (17 Edw., 2), and that this statute was but an affirmance of the common law." This view is sustained by numerous authorities; among others, Oxenden v. Lord Compton, 2 Ves. Jun. 69; *In re* Barker, 2 Johns. Ch. R. 232; *Ex parte*

Latham, 4 Ire. Eq. 235, and 6 *Id.* 406. It is also recognized by our Court of Appeals, in Naylor v. Naylor, 4 Dana, 340. And Lord Campbell, in his Lives of the Lord Chancellors (vol. 1, p. 13) says: "It has been a common opinion that the Chancellor has no jurisdiction whatever in lunacy by virtue of his office, and that this jurisdiction is entirely derived from a special authority under the royal sign manual, which might be conferred on any one else. But I clearly apprehend that a commission '*de idiota*,' or '*de lunatico inquirendo*,' would issue at common law from the Court of Chancery, under the great seal; and that the Lord Chancellor, without any special delegation for this purpose, would have authority to control the execution of it, and make orders for that purpose. The sign manual takes its origin from statute 17 Edw. 2, ch. 9, by which the rents and profits of the estates of idiots are given to the crown, and form part of the royal revenue." In a note he says: "I was obliged to investigate this matter during the short time I had the honor to hold the great seal of Ireland. By an oversight the usual warrant under the sign manual, respecting lunatics, had not in the first instance been delivered to me, but I found that I might safely make some orders in lunacy before I received it," etc.

As said by our court in Naylor v. Naylor, *supra*, the English Chancellor exercised those powers as a judicial officer; and I suppose it can now scarcely be questioned that a Kentucky Chancery Court has substantially the same jurisdiction in such matters as that entertained by the English Chancery. Chancellor Kent says, *In re* Barker, *supra*, that "all the cases agree that the statute of 17 Edw. 2, committing to the king the care of the persons and estates of idiots and lunatics, was not introductory of a new right, but only went to regulate a right pre-existing in the crown."

That statute was almost *totidem verbis* re-enacted by Virginia in 1785; and remained the statutory law of Kentucky until repealed, if repealed, by the Revised Statutes in 1852. Indeed, it seems to me that its substance was preserved in the Revised Statutes, and is still preserved in the General Statutes. The act of 1785 (M. & B., p. 793), in effect provides that the property of the *non compos* shall be taken care of, and he and his family maintained out of the profits, and the residue kept for him and his heirs and distributees. Chap. 53 of the General Statutes, p. 534, in effect makes the same provisions in secs. 1, 2 and 3 of art. 1. It goes farther, and confers, specially, jurisdiction upon courts of general equity jurisdiction over such estates, and the committees and persons of the *non compotes*, and empowers the court, as did the Stat. 43, Geo. 3, ch. 75: "On application of the committee, to order the sale of the whole or any part of the real estate of an idiot, lunatic, imbecile or incompetent person, when indispensably necessary for the payment of debts, or for the maintenance of such person and his family, and when the personal estate, with the rents and profits of the real estate, are not adequate for that purpose." But the statute makes no directions as to who shall be preferred, the *non compos* and his family for maintenance, or the creditors for payment of debts, where the whole property is inadequate to meet both demands. Nor did the statute, 43 Geo. 3, give any such direction.

In *Ex parte* Hastings, 14 Vesey, 182, decided by Lord Eldon, after the enactment of statute, 43 Geo. 3, he said: "He had no authority to pay the debts of the lunatic, unless it was for the accommodation of his estate. He could not pay his debts, and leave him destitute of any provision. * * * * There was no instance of paying the debts of a lunatic without reserving sufficient maintenance for him, as creditors could not touch these funds." And Shelford on Lunacy, p. 357, refers to a still later case (*In re* Deller, 22 Dec. 1821): "Where a lunatic was possessed of leasehold property, the annual income of which was £245, the Lord Chancellor, after directing the annual sum of £150 to be set apart for the maintenance of the lunatic, ordered that the residue of the rents and profits of the estate should be applied by the committee of the estate in payment of the debts reported due to the several creditors of the lunatic, whose names were mentioned in the schedule, ratably and in equal proportions, according to the respective amounts thereof, until the same should be satisfied."

In this country I have found the question under consideration the subject of direct adjudication in but one state—North Carolina. *In re* Latham, 4 Ire. Eq. 231, the lunatic's debts amounted to over $3,000, and his estate had become reduced to $942.14, a fund in court; and, in a contest with creditors, the court said: "We think that this fund must be retained by the committee, not to pay his balance or the debts of any of the creditors, but for the purpose of maintaining the lunatic and his wife and infant children. That the court must reserve a sufficient maintenance for the lunatic before making an order for the payment of debts, or allowing the committee sums already applied by him for that purpose, is clear, from the nature of the jurisdiction in lunacy, as well as the decisions. * * * With respect to the maintenance of the wife and such of the children as, from tenderness of age or other causes, are dependent upon the parent, this court, in Brooks v. Brooks (3 Ire. Law R. 389), gave the opinion that, though it was not mentioned in our statute, it was a proper charge upon the lunatic's estate—it not preventing the maintenance of the lunatic himself—upon the ground that the lunatic himself is chargeable with it; and, among the demands of his estate to be provided for by the order of the court, none can be more meritorious, certainly, and no disposition of the lunatic's estate is so likely to promote the comfort and due care of the lunatic himself." And the court concluded by ordering the whole sum to be "declared a fund necessary for the maintenance of the lunatic and his wife and infant children," leaving nothing for the creditors. This lunatic, Latham, aftewards became of sane memory, and at his instance the commission was suspended; and he applied to the court for leave to withdraw the residue of the fund remaining unexpended, in order to apply it to the payment of his debts. One of his creditors objected, and moved for an order that a debt to him should be first satisfied, the same being due on a judgment, on which execution was issued, which was levied on the land before it was sold under an order for that purpose. The court directed the money to be paid to the former lunatic, and the creditor appealed. On the appeal (*Ex parte* Latham, 6 Ire. Eq. 406), the supreme court held: "After an order of the court, directing a sale of the lunatic's estate for the purposes of the proceedings in the matter of lunacy, creditors can not get at that fund in any manner but by an order of the court. The maintenance of the lunatic is to be provided for in the first instance, and then the means of doing so can not be touched but by the leave of the court, under whose direction the support of the lunatic and the ordering of his affairs are placed. There can then be no lien in the case, at least when there is no specific property of the lunatic not embraced in the order for the sale. The consequence is that, when the charge of the lunatic and his affairs, by the court, ceases by reason of the death or the restoration of the reason of the lunatic, the court proceeds no further in administering the fund, but simply gives it into the hands of the lunatic or his representative, when it will be amenable to creditors in the same manner as the estate of other debtors, and with the

same power of preference by the debtor between his creditors."

It is certainly to be regretted that no authority in the way of judicial precedents on this subject is to be found in this state. In the absence of such authority, I feel at liberty to follow the precedents established in England and North Carolina, the courts of both of which countries are so justly distinguished for the erudition, ability and independence of their judges, especially since the doctrine maintained by them, to my apprehension, conforms so fully in all respects with the demands of justice and the dictates of humanity. And it seems to me that this court can safely and justly proceed upon the principle deduced from the authorities by Mr. Shelford in his work on Lunacy (p. *356), which is this:

"The leading principle of considering, in the administration of the jurisdiction in lunacy, the comforts of the lunatic has been carried so far that, although it never can be the wish of the court that creditors should be defrauded of their just demands, an order will not be made for the payment of the debts of a lunatic out of his funds in court, unless it clearly appear that a sufficient maintenance will remain, or is securely provided for the lunatic."

After the appointment of a committee, and especially after the institution of proceedings for the administration of the lunacy, the lunatic's estate is in *custodia legis*. The committee can only manage it as directed by the court. As Fonblanque (1 Eq., 56) says: "The committee of a *non compos* is but a bailee, and accountable to him or his representatives;" but his conduct in his office is subject to the court's control, and the estate in his hands can be reached by creditors only through the court, whose duty it is to provide for the comfort and welfare of the unfortunate, and those for whom it would be his duty (if sane) to provide; for in providing for the latter, the court most essentially provides for him also. In addition to authorities cited *supra*, see, also, *Ex parte* Phillips, 19 Vesey, 124; L'Amoureux v. Crosby, 2 Paige, 427; *In re* Heller, 3 *Id.*, 200; *In re* Hopper, 5 *Id.*, 490; Williams v. Cameron's Estate, 26 Barb. 173; Bolling v. Turner, 6 Rand. 586; Wright's Appeal, 8 Barr, 57.

It is contended, however, that the only protection the lunatic and his family have in his property against the claims of his creditors is that which our statutes afford in exempting certain property from sale under execution. I think it a sufficient answer to this objection, that all our exemption laws have been enacted with a view of extending further relief to the oppressed debtor, and not with a view of withdrawing from him any protection already afforded him; and especially, it seems to me, were they not intended to strip the unfortunate lunatic for the benefit of his creditors, and turn him over in his sad and helpless condition as a pauper to be supported by the state, and his helpless family, under their legal and physical disabilities of whatever character, to shift as best they can for a living, or to become also the objects of eleemosynary relief. It is scarcely necessary to observe that, while the exemption statutes secure to the debtor certain articles of his property, they are utterly inadequate to his and his family's support. If the principles of protection heretofore announced are well established, it seems to me there is nothing in this objection.

I have, however, had some difficulty and misgivings in this case, as to whether the same protection, which I feel it my duty, as Chancellor, to extend to the lunatic, should also be extended to his wife and daughters; whether some inquiry should not be made as to their ability to earn a support in whole or in part. But one of them labors under the disability of coverture, and the others under that of infancy; and, as seen, their support will contribute essentially to the comfort and support of their husband and father, the lunatic; and I can find in none of the authorities any discrimination on this subject. The claims of the lunatic and his wife and infant, unmarried children seem to stand on the same ground; and I am of the opinion that they ought not to be separated, unless the comfort of the lunatic demand it. But the allowance to all of them must cease upon the lunatic's death, or recovery of the mind; and the allowance on account of any one of the daughters must cease upon her attaining majority, or upon her marriage.

For the foregoing reasons, it seems to me that the objecting creditors have no lien on the lunatic's estate; and that their claim for payment out of it is inferior to the claim of the lunatic and his family, that is, wife and infant, unmarried daugthers, for a competent support out of it. Hence, the petition of the committee and wife must be granted, and their motion of the 9th ult., for an order of reference, must be sustained.

CONSPIRACY TO DEFRAUD — REQUISITES OF INDICTMENT — REVISED STATUTES, SECTION 5440, CONSTRUED.

UNITED STATES v. CRAFTON *ET AL.*

United States Circuit Court, Western District of Missouri, April Term, 1877.

Before HON. JOHN F. DILLON, Circuit Judge, and HON. ARNOLD KREKEL, District Judge.

Requisites of an indictment for conspiracy to defraud the United States, under section 5440 of the Revised Statutes, considered; and that section held not to extend to a case where the contemplated fraud depends entirely upon the passage of a *future* act of Congress to make it effective.

DEMURRER to indictment for conspiracy to defraud the United States.

The indictment in substance charges:

1. That John D. Crafton, one of the defendants, was, at the time charged, the adjutant-general and acting paymaster-general of the State of Missouri; that John D. Crafton, Jr., was a clerk in his office; that the defendants, George M. Irvin, John C. Bender and Waller Young, were acting as the agents and attorneys for the collection of a claim and demand alleged to be due the members of a certain company of enrolled *Missouri* militia, growing out of their alleged services in the war for the suppression of the Rebellion.

2. That for the purpose of defrauding the United States out of the money alleged to be due for such services, the said defendants conspired together to obtain the payment thereof out of the treasury of the United States.

3. That to effect the object of said conspiracy, the defendants, Irvin, Bender and Young, made a false and fictitious muster and pay-roll of said company, and presented the same to the defendant, John D. Crafton, as such acting paymaster-general, to audit, approve and allow the claim contained in said roll.

4. That to further effect the object of said conspiracy, the defendant, John D. Crafton, as acting paymaster-general, did audit, approve and allow such claim, and issued certificates of indebtedness of the *State of Missouri*, for the amount claimed to be due on said roll, and delivered them to the defendant, Young.

5. That further to effect the object of the conspiracy, all of the defendants transmitted the false and fictitious muster and pay-roll of said company to the third auditor of the treasury of the United States, with the amount on said roll as audited, approved and allowed,

and showing the issue of the certificates of indebtedness therefor, for file by the third auditor of the treasury department of the United States, until such time as Congress should thereafter provide for the payment of the fraudulent claim contained in and upon said roll.

6. That further to effect the object of the conspiracy, the defendants employed Craig and Strong to secure the passage of a bill which had been introduced into the Senate of the United States for the payment of said fraudulent claims.

Mr. Mullins, District Attorney, for the United States; *Mr. Chandler*, *Mr. Kemp* and *Mr. Lay*, for the defendants.

DILLON, Circuit Judge:

The indictment is founded upon section 5440 of the Revised Statutes, which is as follows: "If two or more persons conspire * * to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of," etc.

The nature of the acts, charged against the defendants in the indictment, are more fully seen by reference to the act of the legislature of Missouri, approved March 19th, 1874, entitled "An Act to audit and adjust the war debt of the state." Laws 1874, p. 102, sec. 10, *et seq.* The claims "of officers and soldiers of the enrolled Missouri militia" were primarily, and, until assumed by Congress, exclusively, against the *state* and not against the general government. The latter has never assumed their payment. If at the time that the acts, set forth in the indictment, were done, the general government had provided for the payment of such claims out of its own treasury, undoubtedly those acts, fraudulent in their nature and object, would have been criminally punishable. It is just at this point that the case stated in the indictment is vulnerable. Under the recognized rules of criminal pleading, it is not sufficient to allege generally a conspiracy to defraud; but the nature of the fraud, and to the required extent, the manner in which, or the means by which it was to be effected, must be averred. United States v. Cruikshank, 92 U. S. Rep. 542,558. In the case at bar, this has been attempted by the pleader, but the difficulty is, that it appears from the averments, that the alleged conspiracy to defraud the United States was under the existing legislation of Congress legally impossible of execution. The fraudulent muster and pay-roll was transmitted to the third auditor to be *filed*, to await the passage of an act of Congress, which should provide for the payment of the fraudulent claims contained therein. It was not filed as an existing claim against the United States; on the contrary, the debt to the persons named in the roll was the debt of the *State*, and would remain such unless Congress should assume it. It could not be known that such assumption would ever be made, or if made, that the said rolls would have any legal significance or value.

However fraudulent in ulterior design, or morally reprehensible the acts charged in the indictment may be, still our judgment is that section 5440 of the Revised Statutes can not be extended to a case where the fraud which the conspiracy contemplated can only be effected in case an act of Congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurrer to the indictment must be sustained.

JUDGMENT ACCORDINGLY.

KREKEL, J., concurs.

THE PASSAGE OF LAWS — LEGISLATIVE JOURNALS.

THE TOWN OF SOUTH OTTAWA v. PERKINS—THE BOARD OF SUPERVISORS OF KENDALL COUNTY v. POST.

Supreme Court of the United States, October Term, 1876.

In an action by the *bona fide* holder of a negotiable municipal bond, purchased before maturity without notice of its invalidity, other than that imparted by the legislative journals, the defendant may show by such journals that a law printed and promulgated as such by the state authorities, and under which the bond on its face purports to have been issued, is null and void, because not enacted in conformity with the provisions of the state constitution. Reversing the former opinion of this court in same cases, reported 4 Cent. L. J. 132. Waite, C. J., Clifford, Swayne and Strong, JJ., dissenting.

On rehearing, Mr. Justice BRADLEY delivered the opinion of the Court:

The first of these actions was brought by Perkins, the plaintiff below, to recover the amount due upon two negotiable bonds of the town of South Ottawa, in the usual form, for one thousand dollars each, made payable to the Ottawa, Oswego, and Fox River Valley Railroad Company, or bearer, in three years from July 1, 1869, with coupons for the semi-annual payment of interest attached. They each contained recitals as follows:

"This bond is one of a series of 20 bonds bearing even date herewith, each for the sum of $1,000, * * * and is issued in pursuance of an election held in said town, on the 8th day of October, 1866, under and by virtue of a certain act of the legislature of the State of Illinois, approved February 18, 1857, entitled 'An Act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' * * * at which election a majority of the legal voters participating in the same voted 'for subscription' to the capital stock of said railroad in the sum of twenty thousand dollars, and to issue the bonds of said town therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application having been made to the town clerk of the town, and said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid."

The second action was brought on a bond issued by the county of Kendall, in Illinois, bearing date the 4th day of May, 1869, in aid of the same railroad, and by virtue of the same act of the legislature, and containing substantially the same recitals, *mutatis mutandis*, as those in the Ottawa bonds, except that the election authorizing the issue of the bonds is stated to have been held on the 30th day of March, 1869. The facts in the two cases are, in other respects, substantially the same.

The only authority claimed for issuing these bonds is the act referred to in the above recital therein. If no such act was ever passed by the legislature of Illinois, the bonds are void. A municipal corporation can not issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril. Pendleton Co. v. Amy, 13 Wall. 304; Kennicott v. Supervisors, 16 Wall. 465; St. Joseph v. Rogers, 16 Wall. 659; Coloma T. v. Eaves, 92 U. S. 484.

It is insisted on the part of the plaintiffs in error in these cases, that the law relied on for authority to issue

the bonds in question was never passed, no entry of its passage appearing on the journal of the senate of Illinois.

The Constitution of Illinois, adopted in 1848, contains the following provisions:

"Art. III., sec. 1. The legislative authority of the State shall be vested in a General Assembly, which shall consist of a senate and house of representatives, both to be elected by the people."

"Sec. 3. Each house shall keep a journal of its proceedings and publish them. * * *

"21. * * * On the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each house."

The Constitution also provides that all bills passed shall be signed by the speakers of the two houses, and approved and signed by the governor, or, in case of his refusal, shall be repassed by a majority elected to each house. The general laws of the state provide for depositing all acts of the legislature and the original journals of the two houses in the office of the secretary of state, who is charged with having them printed; and the printed statute books are made evidence of the acts contained therein.

In the construction of the constitutional provisions above recited, the Supreme Court of Illinois, by a long course of decisions, has held that it is necessary to the validity of a statute that it should appear by the legislative journals that it was duly passed in the manner required by the Constitution.

As early as 1853, it was decided in Spangler v. Jacoby, 14 Ill. 299, that it was "competent to show from the journals of either branch of the legislature, that a particular act was not passed in the mode prescribed by the Constitution, and thus defeat its operation altogether. The Constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of a law, shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And when a contest arises as to whether the act was passed, the journal may be appealed to, to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the Constitution, that the signatures of the speakers and the executive should furnish conclusive evidence of the passage of a law. The presumption indeed is, that an act thus verified became the law pursuant to the requirements of the Constitution; but that presumption may be overthrown. If the journal is lost or destroyed, the presumption will sustain the law; for it will be intended that the proper entry was made on the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the Constitution, the presumption is overcome and the act must fall."

This case was followed in 1855 by Turley v. County of Logan, 17 Ill., 151. There, a law was supposed to have been passed at the session of the legislature in 1853, for the removal of the seat of justice of Logan county, by a vote of the people. In the fall after, a vote was taken, which resulted in favor of the removal. Turley and his associates then filed their bill to restrain the county officers from erecting county buildings at the new location, on the ground that, as appeared by the journal, the act had not been read in the house of representatives the full number of times required by the Constitution, and so was no law. The fact being as alleged, the injunction was, in the first instance, allowed; but afterwards, in February, 1854, the same legislature met in extra session, and, on recollection of members, and by the manuscript notes of the clerk, the house of representatives amended its journal so that it showed the bill had been read the requisite number of times. Thereupon, the Supreme Court, when the case came there, while recognizing fully the authority of Spangler v. Jacoby, affirmed a decree dissolving the injunction and dismissing the bill, for the reason that it was within "the power of the same legislature, at the same or a subsequent session, to correct its own journals by amendments which show the true facts as they actually occurred."

The same question was also considered by the same court in Prescott v. The Trustees of the Illinois and Michigan Canal, 19 Ill. 324, decided in 1857. There, Prescott and Arnold were entitled to purchase, at the appraised value, certain lots in Chicago, which had been appraised twice, and the point to be decided was whether they should pay according to the first or second appraisal. The second appraisal was made under a law supposed to have been passed February 14, 1851, but which the journals showed had never in fact passed either branch of the General Assemby. Accordingly, the court held, upon the authority of Spangler v. Jacoby, that the second appraisal was invalid, and that the parties had the right to purchase under the first. In the case of the Supervisors of Schuyler County v. The People, 25 Ill. 181, which came before the court in 1860, it was objected that the senate journal did not show that the bill incorporating the railroad company was read three times in that body before it was put on its final passage; but the court, while still approving Spangler v. Jacoby, held that the Constitution did not require the fact that the bill had been read three times to be entered on the journals, and consequently, that the validity of the law could not be impeached on that ground. In 1864, in the case of The People, *ex rel.* Barnes, v. Sterne, 35 Ill. 121 an application was made for a mandamus to compel the treasurer of the state to countersign, register, and pay a warrant issued upon him in favor of Barnes, the relator, by the auditor of public accounts. The warrant was issued upon the authority of what was supposed to be a statute of Illinois, approved February 14, 1863, as compensation for transporting and bringing home certain wounded soldiers belonging to the state; but it being shown that the journal of the house of representatives did not contain entries to the effect that the bill was passed by a majority of the members elect, or that the vote was taken by ayes and noes upon the final passage, the mandamus was refused. In the opinion of the court the authorities are extensively reviewed, and the rulings in the previous cases re-affirmed.

These cases were all decided before the issue of the bonds sued on in this case. But since that time two cases have arisen under the very law now in question, in which the Supreme Court of Illinois has decided that it was never passed, and is not an act of the legislature of that state. The first of these cases, Ryan v. Lynch, 68 Ill. 160, was decided in 1873. Certain taxpayers of the town of Ottawa sought to enjoin the tax collector from collecting a tax which had been levied to pay interest upon bonds issued in aid of the Ottawa, Oswego and Fox River Railroad Company, upon the ground that the act under which the bonds were issued, that of February 18, 1857, (the same which is now under consideration), had not been enacted in conformity with the requirements of the Constitution. At the hearing in the court below it was proven that the journal of the senate did not show that the bill had ever passed that body. Upon this proof, the court, recognizing the authority of Spangler v. Jacoby, and other cases which

followed it, granted the injunction asked for. In the Supreme Court, on appeal, it was insisted that the decrees ought to be reversed, because the bondholders had not been made parties. The objection was overruled, and the action of the court below affirmed.

Following this is the case of Miller and Paddock v. Goodwin, 7 Chicago Legal News, 294, not yet reported in the regular series of the reports of the state. It being shown in this case, as in Ryan v. Lynch, that the journals did not contain the requisite evidence of the passage of the law, it was again adjudged invalid. This was in January, 1875. An effort was made in this last case to impeach the transcript of the legislative journals, but it was unsuccessful. The court repeated what it had said in the case of Ryan v. Lynch, using this language: "The bill never became a law, and the pretended act conferred no power. It follows that the bonds were not merely voidable, but that they were absolutely void for want of power or authority to issue them; and consequently no subsequent act or recognition of their validity could so far give vitality to them as to estop the tax-payers from denying their legality." This opinion, it is true, was delivered after the trial of the case now before us; but it goes to show that up to the very moment of that trial there had been no vacillation in the state court as to the construction and effect of the Constitution of Illinois.

When the cases now under consideration came on for trial in May, 1874, the defendants below offered to prove, by the journals of each house of the legislature, that there was no entry in the same of the passage, by the senate, of the act of February 18, 1857. The testimony was objected to and ruled out. Substantially the same questions were raised by demurrer to a plea. The ground of this decision seems to have been that the holder of the bonds was a *bona fide* purchaser of them without notice of any objection to their validity; that the first installment of interest was paid at maturity; and, therefore, that the defendant was estopped from offering any evidence to show that the act was not passed, the same having been duly published among the printed statutes as a law, and being, therefore, *prima facie* a valid law; in other words, that although the act might not have been duly passed, the town, under the circumstances of the case, was estopped from denying its passage.

We can not assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things, if a document, purporting to be an act of the legislature, could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise.

It is declared by the Judiciary Act, as a fundamental principle, "that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Sec. 34. And this court has always held that the laws of the states are to receive their authoritative construction from the state courts, except where the Federal Constitution and laws are concerned; and the state constitutions, in like manner, are to be construed as the state courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities.

If, therefore, the law in question had never been passed upon by the state courts, the courts of the United States would nevertheless be bound to give to the Constitution of Illinois the same construction which the state courts give to it, and to hold a pretended act of the legislature void and not a law, which the state courts would hold to be so. Otherwise we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same state, differing as to the validity and existence of a statute of that state, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of propriety and right, the decision of the state courts on the question as to what are the laws of the state, is binding upon those of the United States.

But the law under consideration has been passed upon by the Supreme Court of Illinois, and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the Constitution of Illinois, that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States.

This subject was fully discussed in the case of Gardner v. The Collector, 6 Wall. 499. After examining the authorities, the court in that case lays down this general conclusion, "that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." 6 Wall. 511.

Of course, any particular state may, by its Constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but, the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court, on which the responsibility rests in any particular case.

Not only the courts, but individuals, are bound to know the law, and can not be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and can take no advantage from the allegation that he is a *bona fide* purchaser without notice. He would, it is true, be precluded from doing so on another ground—namely, the want of any legislative authority in fact in the town to issue the bonds in question. Want of such authority is a fatal objection to their validity, no mat-

ter under what circumstances the holder may have obtained them.

Thus far we have not adverted to the argument attempted to be drawn by the defendants in error from the fact that the act in question was referred to in two subsequent acts of the legislature as an existing law. One of these was passed on the 27th day of March, 1869, entitled "An Act to amend an act entitled 'An Act to incorporate the Ottawa, Oswego and Fox River Valley Railroad Company.'" This act authorized the company to build a railroad from the town of Wenona to the city of Peoria, and by the second section it was enacted "that any city, county, town or township, near to or through which said road is now or may hereafter be located, is hereby authorized to subscribe to the capital stock of said railroad, upon the terms and conditions prescribed in an act entitled 'An Act to authorize certain cities, counties, towns and townships to subscribe to the stock of certain railroads', in force February 18, 1857." The title here recited is not the title of the act in question. It differs from it in several respects, though this was probably the one that was intended to be referred to. Supposing it to have been the one referred to, it is not pretended that this act of March 27, 1869, embraces the town of South Ottawa, or the county of Kendall, whose bonds are the subject of the present suits. But it is urged that the reference to the act of 1857 is such a recognition of that act, as to give it validity if it had none before. This was certainly not the purpose of the act of 1869, nor do we think that such was its effect. The legislature could not thus, in 1869, give validity to a void act as an act passed in 1857, which was not constitutionally passed in that year; for that would be an evasion of the Constitution. It could at most give it vitality as a new act from the date of the act of 1869. But this it does not profess to do; it only adopts its provisions for the purposes of the act then passed. And if the legislature of 1869 could have validated all proceedings had under the supposed act of 1857, it did not do so. It did not profess to do it. No such purpose is indicated in it. The most that can be said is that, in referring to the act of 1857, the legislature inadvertently supposed that it had been regularly passed. Whether such inadvertence was the result of a false suggestion by interested parties, or otherwise, is of no consequence. No intent to validate and establish the act of 1857 as a law can be gathered from the terms of the act of March 27, 1869. To give to a reference in a subsequent act, such as is here relied on, the effect of validating, or reviving, or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous and would lay the foundation for evil practices. The legislature might in this way be entrapped into the enactment or re-enactment of laws, when it had no intention, or even suspicion, that it was doing so.

The other act relied on was passed on the 20th day of April 1869, and is entitled "An Act to amend an act entitled 'An Act authorizing certain cities, counties, towns and townships to subscribe to the stock of certain railroads', in force February 18, 1857;" being the act in question, if the words "in force" are construed to refer to the date of its supposed passage. This amendatory act declares that, in addition to the cities, counties, towns and townships, authorized by the said act to which this is an amendment, to subscribe to the stock of the Ottawa, Oswego and Fox River Valley Railroad, the following portions of cities, counties, towns and townships be authorized to subscribe to the capital stock of said railroad in manner as provided in said act, except as hereinafter provided. The act then proceeds to designate the portions of towns referred to.

The same observations apply to this act, which have been made in regard to the act of March 27, 1869. It does not profess or purport to give any new force or validity to the supposed act of 1857, or to validate any proceedings had under that act. It takes for granted, mistakenly as we have seen, that the act was duly passed, and does nothing more.

The last-mentioned act could not, in any event, by any prospective effect, aid the holders of the bonds in suit; for the elections called to authorize their issue were held before this act was passed, as appears by the recitals in the bonds themselves. Indeed, the election authorizing the Ottawa bonds was held in 1866, long before the passage of either of the acts referred to. And in the absence of any expression in the laws themselves, evincing such an intention, it can hardly be claimed that these laws gave any retroactive validity to elections which were without authority and void when they were held.

It is to be observed that these statutes were before the Supreme Court of Illinois when deciding the case of Miller and Paddock v. Goodwin, being set up and relied on in the answer of the defendants in that case; but the court evidently did not regard them as having the effect claimed. The bonds were held to be void, and the collection of taxes to pay them was perpetually enjoined.

We do not perceive that the act of Congress, prescribing the mode in which the public acts, records, and judicial proceedings in each state shall be authenticated so as to take effect in every other state, has any bearing whatever on the case. The authentication thus provided for was intended as evidence only of the existence of such acts and records, and not to give them any greater validity or effect than that which they had in the state from which they were thus accredited. The act expressly declares that, when thus authenticated, they shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from which they are taken. It merely provides a mode of proving public records, leaving them when proven invested with the same force and effect (and no other) which they have at home. But when a court of the United States is held in any state, it is bound to know the laws of such state, the same as the domestic courts are.

The judgments of the circuit court in the two cases under consideration are reversed, and the record remanded with directions to award a *venire facias de novo*.

Mr. Chief Justice WAITE, dissenting:

I am unable to agree to the judgment which has been rendered in this case. There is no doubt but that the construction which the courts of Illinois have uniformly given the Constitution of the state is binding upon us as a rule of decision. The difference between me and the majority of my brethren is as to the construction that has been given, not as to its effect when ascertained. After a careful consideration of all the cases to which our attention has been directed, I am forced to the conclusion that the question has been made by the courts of Illinois one of fact, and not of law. The majority of this court think it has been made one of law. Such a construction might, and probably would be more logical; but our duty is to ascertain what has been decided, not what should have been.

The case of Spangler v. Jacoby is the first of a long series of cases in which this question has been considered, and so far as I have been able to discover, little has been done since, except to re-affirm and apply what was there decided.

Looking, then, to that case, we find that *prima facie*

an act enrolled, signed by the speakers of the two houses, approved by the governor, deposited in the office of the secretary of state, and published under his superintendence among the laws certified by him, is a valid law. The language of the court is (p. 300): "The act in question was signed by the speakers of the two houses, and it received the assent of the executive. *Prima facie*, therefore, it became a law." Afterward, in Illinois Cent. R. R. Co. v. Wren, 43 Ill. 79, it is said: "The laws certified by the secretary of state, and published by the authority of the state, must be received as having passed the legislature in the manner required by the Constitution, unless the contrary clearly appears." And again, no longer than last year, in Larrison v. P., A. and D. R. R. Co., 77 Ill. 18: "If we find a law signed by the speakers of the two houses and approved by the governor, we must presume that it has been passed in conformity with all the requirements of the Constitution, and is valid, until the presumption is overcome by legitimate proof."

This law was enrolled; signed by the speakers of the two houses; approved by the governor; deposited in the office of the secretary of state; published by him with the requisite certificate among the laws passed at the session of the legislature in 1857; acquiesced in by the people of the state as a valid law for more than thirteen years after its publication; accepted and acted upon by the inhabitants of South Ottawa in October, 1866, when they voted under it for a subscription to the stock of the railroad company, and authorized the issue of the bonds of the township in payment; recognized as a valid and existing law by the legislature of the state, March 27, 1869, and April 20, 1869, when laws were passed referring to it as in force and amending it, and finally acted upon by the officers of the township when, in obedience to the vote of the inhabitants, they subscribed to the stock of the railroad company and issued the bonds authorized by the act in payment.

In this condition of things the courts were bound to take judicial notice of it as a law in force. This was expressly decided in Illinois Cent. R. R. Co. v. Wren, *supra*, where it is said: "Although we take judicial notice of all acts of the legislature signed by the governor, and found in the office of the secretary of state, and although for some purposes we may take judicial notice of the legislative journals; yet it is not our province, at the suggestion or request of counsel, to undertake to explore these journals for the purpose of ascertaining the manner in which a law duly certified went through the legislature and into the hands of the governor. If counsel say the journal shows a law to have been passed without calling the yeas and nays, let them make the requisite proof of that fact by means of the legislative journals, and introduce the proof into the record." And, again, during the same year, 1867, in Grob v. Cushman, 45 Ill. 124, where the question was as to the jurisdiction of the La Salle County Court, in a case which was brought before the Supreme Court for examination upon a writ of error, this language is used: "It is insisted that the La Salle County Court did not have jurisdiction of the subject-matter of this cause; that the act of the legislature, under which the jurisdiction is claimed, never became a law in the mode prescribed by the Constitution. And counsel, in their argument, refer to the journals of the house in support of this position. On the trial below, no evidence from the journals was introduced. But it is now urged that, as they are public records, the court will take judicial notice of them, and not require them to be embodied in the evidence. It is true that they are public records; but it does not follow that they will be regarded as within the knowledge of the courts, like public laws. Like other records and public documents, they should be brought before the courts as evidence. But when offered, they prove their own authenticity. Until so produced, they can not be regarded by the courts." Both these cases were decided two years before the bonds now in suit were issued. Later, in 1871, in the case of The People v. DeWolfe, 62 Ill. 253, an application was made for a mandamus requiring a justice of the peace to issue an execution upon a judgment recovered before him. In his return he stated that the act, under which he assumed jurisdiction when he gave the judgment, had never in fact been constitutionally passed, and gave the particulars of his claim in that behalf. In delivering the opinion, the court clearly considered the question presented as one of fact; for they say: "It appears by the return, which is not traversed, and is to be taken as true, etc * * * Our decision is predicated solely upon the state of facts as set forth in the return in this case, without an inspection of the journals of the senate, and we pass upon the validity of the act in question no further than as affects the present application in view of the admitted facts in the case."

It is difficult to see what could be done to manifest more clearly the determination of the court to make the question, whether a *prima facie* statute had been constitutionally passed, one of fact, to be established by "legitimate proof" when a contest arises. This may operate to give an apparent statute effect under one state of circumstances, and not under another; but with that we have nothing to do. Our duty is ended, when we have discovered and complied with the rule which the appropriate tribunal has established.

Under the operation of this rule the plaintiff below made out his case, when he proved the execution of his bonds, and put them in evidence; and, in the absence of proof by the defendant, he was entitled to his judgment, even though the law might not have been constitutionally passed, because it was no part of the duty of the court "to explore the journals for the purpose of ascertaining the manner in which a law duly certified went through the legislature."

The question, then, is whether, under the circumstances of this case, the defendant can be permitted to make the proof. This does not depend upon the construction of the Constitution, but upon the general principles of commercial law applicable to the Constitution as construed. The issue is made upon the fact of the passage of the law. *Prima facie* it was passed, and it was apparently in force. Both parties, acting upon this *prima facie* case, and supposing it to be true in fact, have become bound; one has borrowed and the other lent. The lender has performed his part of the contract and delivered the money, and the simple question to be determined now is, whether under such circumstances the borrower can refuse to pay because, upon further investigation, he has ascertained that the legislative journals do not contain the necessary evidence to establish the fact of the due enactment of the law. Reverse the case. Suppose the town had subscribed for the stock and paid the subscription, could the railroad company keep the money and refuse to issue the stock, because after the transaction it had ascertained that a vote had not been taken by ayes and noes in one of the houses upon the final passage of the bill? Certainly not, and the reason is obvious. Under such circumstances the law estops the party from asserting the falsehood of that which appears to be true. This court has from the beginning applied this rule to this class of cases. It was first stated in Commissioners of Knox Co. v. Aspinwall, 21 How. 545, where, using the language of Ch. B. Jervis in Royal British Bank v. Tarquand, 6 Ellis & B., 527, it was said: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with

them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here on reading the deed of settlement will find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." It is unnecessary to refer to the numerous cases which have come up since. While some of them have gone further than the English court did in that from which the quotation was made, none have fallen short of it. We need not go further in this. The purchasers of these bonds were bound to read the statute under which they were issued, but they were not bound to do more. Finding it upon the statute book, apparently in force, they had the right to infer that it was actually in force, and govern themselves accordingly.

It must be remembered that this is not a case of construction. The question is not whether a law admitted to be in force confers the necessary power, but whether a law which does confer the power and is apparently in force can be shown not to have been in fact passed according to the requirements of the Constitution, after parties have acted upon the faith of it and changed their condition. When the question is one of construction alone, all parties stand upon an equal footing, and each can judge for himself. If a mistake occurs, it is one of law and not of fact. Here it is one of fact. The bonds on which this suit is brought are *prima facie* valid, and, as between these parties, I think the law will not admit the testimony offered to show that they are void. In the absence of proof they stand. The question is one of evidence. It is not whether the law has been passed, but whether testimony can be introduced to show that it was not. I think it could not. To admit it would be to ignore a principle of commercial honor upon which we have predicated a long line of decisions. I am not prepared to do so. If the courts of Illinois had been willing to take judicial notice of the legislative journals in determining what the law of the state is, there might be some propriety in requiring the people to do so. But when the courts make the question of overcoming a *prima facie* law one of fact, I think the people may do the same thing, and bring to their protection the same principles of estoppel which govern them in other cases. For these reasons I dissent from the opinion which has just been read.

I am authorized to say that Justices Clifford, Swayne, and Strong concur in this opinion.

NOTE.—The opinion of the majority of the court in the foregoing case is fully in harmony with the views expressed in a note to the opinions first delivered. *Supra*, 137. The weak point in the position taken by the Chief Justice is, it seems to us, that he assumes that, by the construction placed upon some local law of Illinois, the existence of a statute is a question of fact to be tried as any other fact, upon proper allegations and evidence. This, it seems to us, is a mistaken view of the situation. The Supreme Court of Illinois has repeatedly held that certain limitations in the Constitution of that state in regard to the enactment of laws are mandatory, and that no valid law can be passed in violation of such limitations. In so holding, the court undoubtedly construed these provisions of the state Constitution, and that construction is binding upon the federal courts; but there is no local law providing how it shall be determined that these requirements of the Constitution have, or have not, been complied with in the passage of a law. The determination of that question is left to the rules of the common law, by which it must be admitted the existence of a statute is made a judicial question, and not one of fact. The Supreme Court of the United States is bound by the construction placed by the Illinois Supreme Court upon the Constitution of that state, but it is not bound by its erroneous judgment in regard to the application of the common-law rules of evidence.

M. A. L.

RIPARIAN OWNERS.

ROSS *ET AL.* v FAUST *ET AL.*

Supreme Court of Indiana, March Term, 1877.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
" WILLIAM E. NIBLACK,
} Associate Justices.

1. PLEADING—TRESPASS AND CONTRACT—SET-OFF—Where a paragraph on contract is joined with paragraphs for trespass in a complaint, an answer of set-off is a good plea to the paragraph on contract.

2. TITLE OF RIPARIAN OWNERS ON NON-NAVIGABLE STREAMS.—The ownership of the bed of salt-water rivers is in the public; the ownership of the bed of navigable fresh-water rivers situated in the Northwest Territory is not clearly settled; but the Act of Congress of 1796 provides that the title of a proprietor upon a non-navigable stream shall go to the thread of the stream. And the fact that the bed of such stream was not bought and paid for by the original purchaser from the government can make no difference.

PERKINS, J., delivered the opinion of the court:

Complaint by appellants against appellees in three paragraphs—two for trespasses, in unlawfully taking and hauling away gravel from plaintiffs' premises, and the third in assumpsit for the price and value of gravel, used by defendants, which belonged to the plaintiffs. The defendants answered the entire complaint by the general denial, and by a second paragraph alleging an indebtedness by the plaintiffs to the defendants for the value of gravel belonging to the latter and used by the former, and offering to set-off the amount of its value against the demands of the plaintiffs, etc. The plaintiffs moved to strike out the second paragraph of answer. The motion was overruled. They then demurred to it for the alleged reason that it did not contain facts sufficient, etc. The demurrer was overruled, and exception taken. Reply in denial, and payment of the defendants' set-off. Trial by the court. Finding for the defendants. A motion for a new trial was denied, and judgment rendered on the finding. The ground assigned in the motion for a new trial was, that the finding of the court was contrary to law and the evidence. The assignment of errors here is:

The court erred in overruling the motion to strike out the second paragraph of answer; erred in overruling the demurrer to the second paragraph of answer; erred in overruling the motion for a new trial.

The second paragraph of answer, it will be observed, does not allege a tortious taking of the gravel, the value of which is answered as a set-off. It avers that the plaintiffs are indebted to the defendants for gravel hauled away, perhaps by permission, perhaps by mistake.

The court did not err in overruling the motion to strike out the second paragraph of answer, nor in overruling the demurrer to it. The plaintiffs had joined a paragraph in contract with paragraphs for trespass in their complaint, and an answer of set-off was well pleaded to the paragraph on contract. It was a good answer to that, and, if it was not an answer to the whole complaint, this fact did not render it demurrable. Myers v. The State, 45 Ind. 160.

We do not decide whether, in a case where the plaintiff has been guilty of the first fault in misjoining causes of action in tort and on contract, an answer

by way of set-off may not be good to the whole complaint. See Morse v. Hutchins, 10 Mass. 439. On the trial the plaintiff might be allowed to give evidence in support of each and all the paragraphs of his complaint (Paris v. Strong, 51 Ind. 339); and a general verdict for the aggregate damages on all the paragraphs might be rendered. As to the ruling on the motion to strike out, the paragraph, as we have seen, was good even on demurrer.

The remaining error assigned is the overruling of the motion for a new trial.

In considering and deciding the question of error in this ruling, it becomes necessary that we should determine whether the title of the owners of land in Marion County, Indiana, bounded on one side by White River, extends to the edge of the stream, or to the thread of it. If only to the edge of the stream, there was no trespass in this case; if to the thread of it, there was. The trespass complained of was the taking gravel from the bed of White River.

We have in the United States three classes of rivers—one in which the tide ebbs and flows, and which may be called salt-water rivers; one of fresh-water rivers, which are navigable for vessels used in interstate commerce; one of fresh-water rivers which are not navigable for vessels used in interstate commerce. The ownership of the beds of the first class of rivers mentioned is in the public. The ownership of the beds of such of the second class, as are in what is known as the Northwest Territory, is in doubt.

There is no such concurrence of judicial opinion on the point as enables us to say, upon authority, who owns the beds of these rivers, and it is not necessary that we should decide the point in this case. The ownership of the beds of the third class is, *prima facie*, in the proprietors of the opposite banks, each owning to the thread of the stream. We say *prima facie*, because the conveyance to a riparian proprietor may be drawn in terms so restrictive as to limit his title to the bank as a boundary, when, but for such restriction, it would extend to the thread of the stream. But how is the court to be informed that a given fresh-water stream, or a given part of it, is or is not navigable? The tide answers this question as to salt-water streams; but as to fresh-water, there is no such natural criterion. The fact of the navigability of many streams and parts of streams is so generally known, that the courts take judicial notice of it, and proof upon the trial is not required. Neaderhouser v. The State, 28 Ind. 257. By the act of Congress of 1796, in respect to the survey and sale of the lands northwest of the Ohio River, the public lands were required to be divided so as to form townships six miles square, unless where, etc., or the course of navigable rivers might render it impracticable; and it was further provided by the act that all navigable rivers within the territory mentioned therein should remain public highways, "and that, in all cases where the opposite banks of any stream not navigable should belong to different persons, the stream and the bed thereof shall be common to both." The language of this act creates a tenancy in common; but it is decided in Railroad Company v. Schurmeir, 7 Wall. (U. S.) R. 272, that, by the above provision, Congress meant to enact that the common-law rules of riparian ownership should apply in cases of owners of the opposite banks of non-navigable streams, giving each exclusive ownership to the thread of the stream; thus giving us another instance where a court has exercised its great but beneficent power of enforcing statutes according to what the legislature meant rather, than according to what it said. The same construction is given to this provision by the courts of Ohio. Walk. Am. Law, 279.

"The second section of the act of Congress of 1796 provides that navigable rivers shall not be included in *public surveys*, but does not indicate what shall be considered such, and it is left to the surveyor to include a given river or not; but of course, his decision can not be conclusive." Walk., *supra*, 278.

The idea that the power was given to a surveyor, or his deputy, upon casual observation to determine the question of the navigability of rivers, and thereby conclude vast public and private rights, is an absurdity. Moreover, the act of Congress does not determine the effect the conclusion of the surveyor upon the navigability of a stream, and the fact of his meandering its banks, shall have upon the title of riparian owners to the bed of the stream. His meander lines are not boundary lines, and the question still remains, how far beyond these meander lines does the title of the riparian proprietor extend? Does it go to high-water mark, to low-water mark, or to the thread of the stream? Judicial opinions are about equally divided on this question. Doe v. Hildreth, 2 Ind. 274; Railroad Company v. Schurmeir, 7 Wall. 272; Sherlock v. Bainbridge, 41 Ind. 35; Gavit's Adm'rs v. Chambers, 3 Ohio, 495; Middleton v. Pritchard, 3 Scammon (Ill.), 422; Braxon v. Bressler, 64 Ill. 488; Musser v. Hershey, 42 Ia. 356; Granger v. Avery, 64 Me. 292; Burson v. Morrow, 61 Mo. 345; County of St. Clair v. Livingston, 23 Wall. 46.

But while the act of Congress does not declare the extent of title of a riparian proprietor upon a navigable stream, it does emphatically declare that the title of a proprietor upon a non-navigable stream shall go to the thread of the stream. Railroad Company v. Schurmeir, *supra*.

And from what has been said, it will appear that, in our opinion, nature, in the language of Judge Dewey in Martin v. Bliss, 5 Blackf. 35, is competent to make a navigable river without the aid of a legislature, and, we may add, can determine, whether she has succeeded or not in a given case, with as much accuracy as a deputy surveyor. It is navigability in fact, that constitutes navigability in law. McManus v. Carmichael, 3 Iowa, 1. The court knows judicially, as matter of fact, that White River, in Marion County, Indiana, is neither a navigated nor a navigable river. It follows of course that, by the express enactment of Congress, the title of its riparian proprietors extends to the thread of the stream. This would seem to make an end to controversy in this case.

But it is claimed that the surveyor made a mistake and meandered the banks, and failed to survey the bed of a non-navigable stream, and hence its bed was not bought and paid for, and did not pass to the purchasers of the bordering lands. This proposition assumes as a legal principle, that the bed of a stream can not pass to the purchaser of the adjoining lands, unless it is included in the survey and paid for. This is begging the question. We have already seen above that, as to lands bordering on rivers actually navigable, the beds of which, by law, were not to be surveyed and paid for, it is not well settled that the common law does not apply and carry the title of the riparian purchaser to the thread of the stream.

On the other hand it is well settled that, in the analogous case of a purchaser of land bordering on a public highway on land, the title of the purchaser extends to the middle of the same. In a late case, Pettibone v. Hamilton, 40 Wis., 402, it is declared, "that, in the absence of anything in his deed to show a contrary intention, the grantee of a lot, in a recorded plat, takes to the center of adjoining public ways, subject to the public easement; and this result is not affected by the fact that the description in the deed, as well as the plat, gives the dimensions of the lot as it is, exclusive of the highway," and that "this doctrine

applies in favor of one who took a deed, by metes and bounds only, of land which afterwards constituted a distinct lot upon a plat subsequently made and recorded by his grantor." Woodman v. Spencer, decided in 1875, by the Supreme Court of New Hampshire, 14 Am. Law Reg. (N. S.) 411, is an equally strong case. It is there decided that, "where a conveyance of land describes it as bounded by a stream not navigable, or by a highway, whatever terms may be used in describing such boundary, it must be construed as extending to the middle of the same, unless there is a clear expression of an intention to limit it to the margin of such stream or way." And the reason is given for this rule, both in the opinion in the case and by Judge Redfield, in a note to it. Substantially the same reasons are assigned for the rule in Broxon v. Bressler, 64 Ill., on page 492. The rule is founded in public policy. "The peace of society," says Mr. Justice Thornton, "and the security of personal rights demand a legal recognition of ownership of the beds of the streams within the states as well as the waters. Wrongs and trespasses must often be committed. Contests and litigation as to the rock, as in this case, and frequently as to the gravel and soil, must arise. The riparian owner should have a remedy against the wrong-doer. He gains by alluvion and loses by avulsion, and for his full security should have the right to protect the stream from individual trespasses. The opposite view vests the fee in the United States, and makes them the proprietor of every navigable stream in the United States. This interposition in the prosecution of trespassers would be an intermeddling with the policy of the state, and would be perilous to its sovereignty. The common-law rule would best subserve the public peace and protect from violence."

The above views of the Supreme Court of Illinois are expressed touching the ownership of the bed of the Mississippi, a known and admitted navigable stream. Their force is much greater when applied to a non-navigable stream.

Judge Redfield, in the note above referred to, speaking of the rule that extends the title of owners upon highways and streams, says: "Its chief object is to prevent the existence of innumerable strips and gores of land along the margins of streams and highways, to which the titles for generations shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless litigation shall spring up to vex and harass those who, in good faith, had supposed themselves secure from such embarrassment."

In Grose v. West, 7 Taunton, 39, Gibbs C. J. says: "*Prima facie* a strip of land between a highway and the adjoining close belongs to the owner of the close; as the presumption also is that the highway itself *ad medium filum viae* does." Accord: Cox v. The Louisville, &c., Co., 48 Ind. 178.

Public policy dictates the private ownership of the bed of unnavigable rivers. The facts, then, that the bed of the river was not surveyed nor paid for, do not necessarily exclude it from the ownership of the adjoining proprietors; and, as to the fact, if it be so, that it was not paid for, we may observe that it is a circumstance of little importance. The government was not selling her public lands for the purpose of making money. She did not sell them for their value. She was selling them for an almost nominal price, $1.25 an acre, enough to cover the cost of survey and sale. Possibly a little more. Her object was to induce the settlement in the country of a hardy, land-owning people. Her surveys of the whole were more or less inaccurate. We know, as matter of general knowledge, that often sections exceed and often fall short of the quantity paid for, to a greater extent than was produced by the mistake of the surveyor in this case, touching the fact of the navigableness of the stream. It could have produced a loss of but a very few dollars. On the other hand, we have the clearly expressed intention of the grantor, expressed by a solemn legislative enactment, that the title should pass to the thread of the stream. Public policy demands that it should so pass. And the mistake of the surveyor is not one of such pecuniary amount that it would be regarded as sufficient, affecting the fairness of a private contract, to vitiate it. We think the title of riparian proprietors on White River in Marion County, Indiana, extends to the thread of the stream.

The judgment is reversed with costs, and the cause remanded with instructions to proceed in accordance with this opinion.

BOOK NOTICES.

BOOKS RECEIVED.—Nevada Reports, vol. 11. A. L. Bancroft & Co., San Francisco.——Barton's History of a Suit in Equity. American Edition by James P. Holcombe. Robert Clarke & Co., Cincinnati.——Iglehart's Treatise on the Powers and Duties of Justices of the Peace and Constables in the State of Indiana. Robert Clarke & Co., Cincinnati.

REPORTS OF CASES IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR THE NINTH CIRCUIT. By L. S. B. SAWYER, Counselor at Law. Vol. III. San Francisco: A. L. Bancroft & Co. 1877. pp. 722.

This circuit comprises the states of California, Oregon and Nevada—in some respects one of the most important in the country. The Circuit Judge—the Hon. Lorenzo Sawyer—by whom most of the opinions in this volume were written, was well known to the country as a member of the Supreme Court of California before his appointment to the Circuit Court in 1869. He was, we believe, the Chief Justice of California at the time of his transfer to the federal bench. It was the ability and learning which he then displayed, that fitly led to this transfer. His opinions, recorded in this and the previous volumes of this series, mark him as a judge of great research, solid learning and sound judgment. This volume contains also several extremely valuable opinions by Mr. Justice Field, the judge of the Supreme Court assigned to this circuit, and by Judges Hoffman, Deady and Hillyer. We have not met with a case in the present volume which is not worth reporting, and it is full of cases relating to commercial and corporation law. It will be found as useful and valuable in the state as in the federal courts, and elsewhere as in the Pacific Circuit. The reported cases are brought down to and include those decided in 1876. The volume is handsomely printed, and is much larger than most of the Circuit Court Reports.

CORRESPONDENCE.

EFFECT OF RECORDING DEED WITHOUT INDEXING.

To the Editor of the Central Law Journal:

I have just received your issue of April 27th, and on page 387, I find an interesting discussion of the "Effect of Recording a Deed without Indexing as to Subsequent Purchasers." This discussion refers to a former article on the same subject, on page 340. It is acknowledged in both these articles that the injured party may have redress by an action against the clerk. The question which party must sue the clerk, is the main one. I am more in accord with the reasoning and conclusions reached in the article on page 387, though the other is more in accord with the decision of my own state in the case of Throckmorton *et al.* v.

Prince *et al.*, reported in 28 Texas, 605. This was a suit for an injunction by a subsequent vendee, to restrain a prior trustee from selling the land; the trust deed had been previously filed for record, not recorded, and was on file when the records were examined, though the opinion does not notice this fact. The court say, Chief Justice Moore delivering the opinion: "There was no controversy about the facts. The evidence clearly shows that the deed of trust under which the appellants claim, though filed with the county clerk for record, and so endorsed by him some time prior to the date of the deed to the appellees, was not, in fact, recorded until after their purchase of the land. It is also unquestionably true, that all reasonable diligence was used in behalf of the appellees to ascertain whether the land was free from incumbrance, and that it was bought and paid for by them on the assurance of the county clerk that there was no evidence in his office of any conflicting right to it." So this case is brought clearly within the rule of Life Insurance Co. v. Dake, 4 Cent. L. J., 340. Our statutes are very strong on this subject. Paschal (Digest, Art. 5014), says: "Every such instrument of writing shall be considered as recorded from the time it was deposited for record," etc. And Art. 5015: "Each recorder shall provide and keep in his office a well-bound book, and make and enter therein an index, in alphabetical order, to all books of record wherein deeds, mortgages, etc., are recorded, distinguishing the books and pages in which every such deed or writing is recorded." Art. 5018 provides a penalty of $500, and makes the clerk liable to the injured party.

The court, in the case referred to, after quoting the statute on the subject, say: "If the clerk has neglected to comply with these plain, simple requirements of the statute, and appellees have been thereby misled to their injury, they can not claim redress for such injury from appellants, who have been in no default. The law did not impose upon them the responsibility of seeing that the duties prescribed by the statute for the protection and security of other parties were in fact faithfully discharged by the clerk." The court cite from Kentucky, Bank of Kentucky v. Haggin, 1 A. K. Marsh. 306; and from Connecticut, they cite Franklin v. Cannon, 1 Root; Hartmyer v. Gates, *Ib.*61; McDonald v. Leach, Kirby, 72; Judd v. Woodruff, 2 Root, 298; and also, McGregor v. Hill, 3 Stew. & P. (Ala.), 397. Our statute is almost identical with the statute of Iowa, and the conclusions are so very opposite, that I concluded to send you the above note, taken immediately after reading your last article. In the case before our court the deed was in the clerk's office all the time, but could not be found; and the clerk in effect certified that it was not there. Suppose the deed had been deposited for record, and had been entirely lost and never recorded; and suppose the party who deposited it had proved conclusively that he did deposit it, at a certain time. Now, if we say this was notice to subsequent purchasers, we give the record an efficiency that it has not; we speak for the record what it does not say itself, and we have the anomaly of a record existing in parol. We think our court has gone too far. If the first vendee wants to establish what would be constructive notice, he must *do it*, and not trust to the clerk to create a benefit for him. In the case then before the court, both parties were innocent; one depended on the clerk to perfect his rights, and the other did not. "He who trusts most, where one of two innocent persons is to suffer, shall lose most." 13 Wend. 572; 4 N. H. Rep. 455; Kesler v. Zimmerschitte, 1 Tex. 56. F. H. P.

Calvert, Texas, May 1, 1877.

NOTES OF RECENT DECISIONS.

ASSSAULT WITH INTENT TO COMMIT MANSLAUGHTER—UNLAWFUL INTENTION TO KILL—CONVICTION FOR DIFFERENT GRADE OF OFFENSE. — *State v. Throckmorton.* Supreme Court of Indiana, 16 Am. L. Reg. 234. Opinion by Downey, J. 1. There may be an unlawful intention to kill, and yet the killing be only manslaughter, if it be without malice, as e. g., upon sudden heat or quarrel. Therefore, an indictment for assault and battery with intent to commit manslaughter is good. 2. Where a statute provides that upon an indictment for an offense, consisting of different degrees, the jury may find the defendant not guilty of the degree charged, but guilty of any degree inferior thereto; the jury, upon an indictment for assault and battery with intent to murder, may find a verdict of guilty of assault and battery with intent to commit manslaughter. Therefore, where an indictment charged in the first count an assault with intent to murder, and in the second, an assault with intent to commit manslaughter, and the court on motion quashed the second count on the ground that there was no such crime as an assault with intent to commit manslaughter, it was *held* that, although it was error to quash the second count, yet as the defendant might have been convicted of the offense therein charged under the first count, the judgment would not be reversed. Upon the first point the court says: "We are aware that many criminal lawyers of this state are of opinion that there can be no such thing as an assault, or an assault and battery, with intent to commit manslaughter. It is said by Judge Bicknell in his work on Criminal Law, that 'there can be no indictment for an assault and battery with intent to commit the crime of manslaughter, because the peculiarity of manslaughter is that it is free from unlawful intention to kill.' Bicknell's Crim. Prac. 292. It is a mistake to say that there can be no unlawful intention to kill in voluntary manslaughter: Murphy v. The State, 31 Ind. 511. Mr. Bishop, in his work on Statutory Crimes, sec. 508, expresses the opposite view to that taken by Judge Bicknell, and thinks such view contrary to the actual course of things in the other states, and 'not sound as general American doctrine.' In New Hampshire there was a statute providing 'that, if any person shall make an assault upon another, with intent to commit any crime described in this chapter, the punishment whereof shall be, &c., he shall be punished,' &c., and manslaughter was among the crimes described; it was held that this provision embraced among the rest an assault with intent to commit manslaughter. The State v. Collegan, 17 N. H. 253. In Murphy v. The State, *supra*, the court, in speaking of the instructions given, said: 'By these instructions the jury were told in effect, that there could be no purpose to kill in manslaughter, and that if such a purpose were shown to exist, the killing would be murder. This we think is not a correct exposition of the law. The killing may be unlawful and purposely done, and yet, if it is done without malice, in a sudden heat and transport of passion, caused by a sufficient provocation, it is only manslaughter. It was so held in Dennison v. The State, 13 Ind. 510.' A reference to the case in 13 Ind. will show that the question was there so decided. The case of Dennison v. The State is cited and followed in Hoss v. The State, 18 Ind. 349, and Long v. The State, 46 Ind. 582."

EASEMENTS—WAYS OF NECESSITY—GRANT OF PART OF LAND WITH AN EXISTING WAY UPON IT.—*O'Rorke v. Smith.* Supreme Court of Rhode Island, 16 Am. L. Reg. 205. Opinion by Durfee, C. J.—M. C., owning a

tract of land bounded North by a street, conveyed to D the west portion, whereon was a well, reserving a right to use the well by these words: "Excepting a privilege to the well of water on said lot, which I reserve for the use of my said homestead estate," this homestead estate being the remainder of the tract. Subsequently, M. C. devised to J in fee simple the land between the house and the lot conveyed to D, together with a tenement in the house, and to S the rest of the homestead estate. For a long period, but not for the time required to gain an easement by prescription, all the occupants of the homestead estate had crossed the land between the homestead and D's lot on their way to the well. In trespass *quare clausum*, brought by the grantees of J against S, *Held*, that the way across J's lot could not be claimed as a way of strict necessity. *Held*, further, that the way could not be implied from the circumstances of the case as one reasonably necessary. The law in regard to the creation of easements by implication, where estates have been united in a single ownership, which are severed by deed, will, or partition, is elaborately discussed in the third and last edition of Washburn on Easements and Servitudes, published in 1873. The cases there collected and collated are somewhat discordant, but they are very generally to the effect that, where the easement or *quasi* easement is continuous, apparent, and reasonably necessary to the beneficial enjoyment of the estate for which it is claimed, a grant thereof will be implied. The rule applies especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and water-pipes or spouts, all of these being continuous easements technically so called—that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them. Ways are not in this sense continuous easements, but discontinuous or non-continuous, being enjoyed only as they are traveled. This distinction, however, between ways and the other easements mentioned has not been uniformly regarded, and there are cases, especially in Pennsylvania, in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another will, upon a severance of the estate, pass as implied or constructive easements appurtenant to the part of the estate for the benefit of which they were established. Kieffer v. Imhoff, 26 Penn. St. 438; McCarty v. Kitchenman, 47 *Id.* 239; Phillips v. Phillips, 48 *Id.* 178; Pennsylvania Railroad Co. v. Jones, 50 *Id.* 417; Cannon v. Boyd, 73 *Id.* 179; Thompson *et al.* v. Miner, 30 Iowa, 386; Huttemeier v. Albro, 2 Bosw. 546; affirmed, 18 N. Y. 48. But in New Jersey the doctrine was held to be inapplicable to ways. Fetters v. Humphreys *et al.*, 19 N. J. Eq. 471. And there are many English cases in which the application of the doctrine to ways has been denied. Pheysey *et ux.* v. Vicary, 16 M. & W. 484; Whalley v. Thompson *et al.*, 1 Bos. & Pul. 371; Worthington v. Gimson, 2 El. & E. 618; Dodd v. Burchell, 1 H. & C. 113; Polden v. Bastard, 4 B. & S. 258, and affirmed, Law Rep. 1 Q. B. 156; Thompson v. Waterlow, Law Rep. 6 Eq. 36; Langley *et al.* v. Hammond, Law Rep. 3 Exch. 161; and see Pearson v. Spencer, 1 B. & S. 571, and affirmed, 3 B. & S. 761; Daniel v. Anderson, 31 L. J. N. S. 610, cited in Washburn on Easements, 3d ed., 59. If the grant of a way, existing previously *de facto*, can be implied from anything short of necessity, the party claiming the way should be required either to show, as in Pettingill v. Porter, 8 Allen 1, that without the use of the way he will be subjected to what, considering the value of the granted estate, will be an excessive expense; or to show, as in Thompson *et al.* v. Miner, 30 Iowa, 386, that there is a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment; or to adduce some other indication equally conclusive; and see Worthington v. Gimson, 2 El. & E. 618; Leonard v. Leonard, 7 Allen 277, 283.

CONSTITUTIONAL LAW—ACT OF LEGISLATURE PROVIDING FOR DECISION IN CASE OF AN EQUALLY DIVIDED BENCH.—*Perkins v. Scales.* Supreme Court of Tennessee. Opinion by Freeman, J. 1 Legal Reporter (N. S.) 15. I. It is not in the power of the legislature to direct what shall be the decision of the supreme court in case the judges are equally divided. 2. The act of March 6, 1875, provides substantially "that in all cases now pending in the supreme court, or hereafter brought thereto, in which the judges shall be equally divided, the judgment shall be determined as follows: If the case depend upon the constitutionality of any act of the General Assembly, then such judgment or decree shall be in favor of the validity of such act. In all other cases the judgment or decree of the court below shall be affirmed." *Held* unconstitutional. By the constitution the powers of the government are distributed among three departments: the legislative, executive and judicial, and no person or persons belonging to one shall exercise any of the powers properly belonging to either of the others, except in cases herein permitted or directed. Art. 2, secs. 1 and 2. By the schedule to the constitution of 1870, it was provided that six judges should compose this court, until there should be a vacancy occurring after the 1st of January, 1873. Sec. 2. The court thus constituted was the supreme judicial tribunal of this state. According to the genius of such an organization, a majority of the court would be required to render a decision; for if this was not the case, then a minority might. Whatever decree the court shall give must be the result of its own judgment in the performance of the functions assigned to it by the constitution. No other department has the right to indicate or dictate what that judgment shall be. This would be to usurp the judicial function confided exclusively by the constitution to the judicial department. Whether the legislature might have enacted a rule of this kind for the government of the court, applicable to future cases alone, may possibly be a different question, though it would seem difficult to distinguish in principle between this and an enactment operating on cases then pending. In either case, it is not to prescribe a rule of future conduct, but to dictate a judgment for the court, not based on the law and the facts, but upon a certain state of opinion held by the judges. If the legislature could declare a decision under such circumstances, they might adopt any arbitrary rule, prescribing how the decision of the court should be determined. Citing Mabry v. Baxter, MSS., (Knoxville, 1877).

NOTES OF RECENT ENGLISH DECISIONS.

PATENT—INFRINGEMENT—INTERIM INJUNCTION—MOTION TO COMMIT.—*Plimpton v. Spiller*, Court of Appeal, 25 W. R. 152. On a motion for an interim injunction, in an action to restrain the infringement of a patent, the usual practice of the court is to refuse the application, and to order the defendant to keep an account of profits until the hearing; but if it appears that under the circumstances this would be an inconvenient or ineffectual mode of compensating the plaintiffs, if in the right, and the balance of evidence appears in his favor, the court will grant the injunction, on the plaintiff giving an undertaking to abide by any order as to damages (if any) that may ultimately be made, and the court is the more ready to adopt this course where the business of the defendant is a newly established, than where it is an old established trade. Under such circumstances the Master of the Rolls granted an

interim injunction. The defendant appealed. The court (James, L. J., and Brett, J. A., Baggallay, J. A., dissenting) affirmed the decision.

SHIP — GENERAL AVERAGE — AUXILIARY STEAM POWER FOR PUMPING—USING SHIP'S SPARS FOR FUEL.—*Roberson v. Prince et al.*—High Court Q. B. Dir. 25 W. R. 112. The owner of a cargo is entitled in time of peril to the use of all the appliances on board the ship which are adapted for the purpose of saving it; and if the ship is fitted with a separate engine for pumping, the owner of the ship must, before sailing, provide a reasonable supply of fuel for working such engine. Accordingly, if in time of peril it becomes necessary to burn part of the ship's furniture as fuel for the pumping engine, the owner of the ship is not entitled to general average against the owners of the cargo, unless at the commencement of the voyage there was on board the ship a reasonable supply of fuel for the pumping engine. During the argument the following authorities were cited: Harrison v. The Bank of Australasia, 20 W. R. 385, L. R. 7 Ex. 39; Wilson v. The Bank of Victoria, 15 W. R. 693, L. R. 2 Q. B. 203; Birkley v. Presgrave, 1 East, 220, 228; Plummer v. Wildman, 3 M. & S. 482; Johnson v. Chapman, 14 W. R. 264, 19 C. B. 563; Stewart v. West India Steamship Company, 21 W. R. 381, L. R. 8 Q. B. 88; also to 2 Arnould, Marine Insurance, 4th ed., p. 773; 2 Phillips, Marine Insurance, secs. 1270, 1299, 1400.

TIDAL RIVER—RIPARIAN OWNER—ACCESS TO WHARF—PRIVATE RIGHT.—*Lyon v. Fishmongers Co.* House of Lords, 25 W. R. 165. The owner of land abutting on a tidal navigable river has, *jure naturæ*, a right of access to and from the stream wholly distinct from the right of navigation which he enjoys in common with the rest of the public. The Duke of Buccleuch v. The Metropolitan Board of Works, L. R. 5 H. L. 418, and The Metropolitan Board of Works v. McCarthy, 23 W. R. 115, L. R. 7 H. L. 243, followed. By the Thames Conservancy Act, 1857 (20 and 21 Vict. c. cxlvii.), s. 53, the conservators may grant (on such terms and conditions as they may think fit) to the owner or occupier of any land fronting and immediately adjoining the river, a license to make any dock, basin, pier, jetty, wharf, quay, embankment, wall, or other work immediately in front of his land, and into the body of the river. By section 179, nothing in the act is to extend to take away, alter, or abridge any right, claim, privilege, etc., to which any owner or occupier of land on the banks of the river was entitled at the passage of the act. The plaintiff was the owner of a wharf abutting towards the south upon the Thames, and towards the west upon an inlet from the river which was covered with water at high tide. There were stairs and doors on both the south and the west side, which had been used by the occupier of the wharf for the purpose of loading and unloading barges. The defendants, the owners of the land on the south of the inlet, obtained from the conservators a license to form an embankment in front of their land, which would have entirely filled up the inlet, and rendered it impossible for barges to reach the west front of the plaintiff's wharf. *Held*, that the plaintiff was entitled to a right in respect of land on the bank of the river within section 179, and that the defendants should be restrained by injunction from proceeding with the construction of the embankment. Per Lord Selborne.—For the purpose of a riparian right, lateral contact with a stream is, *jure naturæ*, as good as vertical contact. Judgment of the Court of Appeal in Chancery (reported 24 W. R. 11, L. R. 10 Ch. 679), reversed, and decree of Malins, V. C., (reported 23 W. R. 689), restored.

TRUSTEE—BREACHES OF TRUST—LIABILITY OF TRUSTEE'S OWN BENEFICIAL INTEREST.—*Fox v. Buckley.* Court of Appeal, 25 W. R. 170. A trustee and executor, who took a life interest in his testator's residuary real and personal estate, misappropriated and wasted portions of the estates specifically devised and bequeathed, and subsequently became bankrupt. *Held*, that his estate in the residuary realty being legal, could not be applied in making good his breaches of trust. The appellants' counsel contended that the cases establish this proposition, that wherever a duty is imposed on a trustee, and by the same instrument a benefit is given him, if he accepts the benefit, he must perform the duty: Priddy v. Rose, 3 Mer. 86, 104; Jacubs v. Rylance, L. R. 17 Eq. 341, 22 W. R. Ch. Dig. 251. In Woodyat v. Gresley, 8 Sim. 180, the court interfered with the legal estate of a trustee, and actually applied a legal rent-charge in replacing certain stock that had been misappropriated by him. In Waring v. Coventry, 2 My. & K. 406, it was held that remainder-men had an equity against the income of a tenant for life in respect of a loss arising from a breach of trust by him. Egbert v. Butter, 21 Beav. 560, was the case on which the Vice-Chancellor relied; but they submitted it was not binding on the court, and, as there was a conflict of authority, ought not to be followed. Since the judicature acts, equity was to prevail over law, and the court must now adopt equitable rules with regard to legal estates. They also cited Coote v. O'Reilly, 1 J. & Lat. 455: Ex parte Barff De G. 613; and Hurst v. Hurst, 22 W. R. 939, L. R. 9 Ch. 762—JAMES, L. J: It had been said many times during the argument that there was a conflict of authority, but the only authority in point was that of Egbert v. Butter, which was directly against the appellants; all the other authorities cited had no bearing on the case. Woodyat v. Gresley was the case of a debt which the court thought, under the circumstances, ought to be paid out of a rent-charge; it was, in fact, a matter of contract. Coote v. O'Reilly, 1 J. & Lat. 455, depended on a covenant in a marriage settlement. Ex parte Barff was much nearer the present case, and there Vice-Chancellor Knight Bruce held that a debt due from a devisee to his testator's estate did not constitute any lien on the devised estate. The legal estate of which Buckley was in possession was, under no circumstances, under the control of the court. The moment the testator died it became absolutely his, and no one had the power to deprive him of it, because he subsequently became indebted to the trust estate. No doubt it was a hard case for the family, but there were other persons to be considered as well as the family. MELLISH, L. J., and BAGGALLAY, J. A., concurred.

RECENT LEGISLATION.

MISSOURI LEGISLATURE—SESSION OF 1877.

AN ACT to authorize Boards of Directors, Boards of Trustees and Boards of Education in the State of Missouri, to submit to the voters of their respective districts, in cities, towns, and villages and other districts, propositions to increase the annual rate of taxation for school purposes and for erecting school houses.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Whenever it shall become necessary in the judgment of the board of directors of any school district, or boards of trustees or boards of education of any city, town or village in the state, to increase the annual rate of taxation for school purposes, or when any five resident tax-payers of such district shall petition such board, in writing, that they desire an

increase in the rate of taxation, such board shall determine the rate of taxation necessary to be levied in such district, within the maximum rates prescribed by the Constitution for such purposes, and shall submit to the voters of said city, town, village or other school district, who are tax-payers of such city, town, village or other school district, at an election to be by such board called and held for that purpose, at the usual place of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board; and if a majority of the voters who are tax-payers voting at such election shall vote in favor of such increase, the result of such vote and the rate of taxation so voted in such district shall be certified by the clerk or secretary of such board or district, to the clerk of the county court of the proper county, who shall on the receipt thereof proceed to assess and carry out the amount so returned on the tax-book, on all the taxable propoerty, real and personal of such city, town, or village or other school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants, as provided by law.

SEC. 2. Such boards of education or school boards of any city, town or village, or board of directors of any school district in the state, shall, whenever it shall become necessary in their judgment, or be requested by a petition of two tax-payers of any school district, city, or town, or village, to increase the annual rate of taxation for the purpose of erecting school buildings in such district, determine the rate of taxation necessary to be levied within the maximum rates prescribed by the Constitution and as therein limited for such purposes, and shall submit to the voters of districts formed of cities, towns and villages, or other school districts, at an election to be by such board called and held for that purpose, at the usual place of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board for erecting school buildings; and if two-thirds of the qualified voters of such school district, or of such city, town or village, forming a school district, voting at such election, shall vote in favor of such increase, for the purpose aforesaid, the result of such vote and the rate of taxation so voted, shall be certified by the secretary or clerk of such board to the clerk of the county court of the proper county, who shall, on the receipt thereof, proceed to assess the amount so returned for building purposes on all the taxable property, both real and personal, of such city, town, or village, forming such school district, or other school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants, as is provided by law.

SEC. 3. The elections authorized in this act may be held at the same time and place, and in the manner now provided by law for holding elections for school purposes; but the propositions in that event submitted, must be voted upon separately, and certified as hereinbefore provided.

SEC. 4. Said boards of directors of boards of education, calling such election, shall cause at least fifteen days' public notice to be given of the time and place of holding such election or elections, and the purposes for which it is held, by publication in some newspaper published in such city, town or village forming such school dirtrict, or other school district; and if no newspaper is published in such school district, then by five written or printed hand-bills, posted in five of the most public places in such district.

SEC. 5. There being no law by which the people may have the benefit of this act in holding school elections in the year 1877, an emergency exists for the immediate taking effect of this act; therefore, this act shall take effect and be in force from and after its passage.

Approved March 24th, 1877.

ILLINOIS LEGISLATURE—SESSION OF 1877.

AN ACT to establish Probate Courts in all counties having a population of one hundred thousand, or more, to define the jurisdiction thereof and regulate the practice therein, and to fix the time for holding the same.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That there shall be established in each of the counties of this state, now created and organized, or which may be hereafter created and organized, and which have a population of one hundred thousand, or more, court of record to be styled, "The Probate Court of (name of) County." Such court shall have a seal and may, from time to time, as may be necessary, renew or alter the same. The expense of such seal, and of renewing and altering the same, shall be paid by the county.

SEC. 2. Said court shall be held in the court-houses of the respective counties in which they shall be established, or in the usual places of holding courts, or in suitable rooms provided therefor at the county seat.

SEC. 3. The judge of said court, in each county in which such court shall be established, shall be elected on the Tuesday next after the first Monday in November, at the same election at which the county judge is elected, and every fourth year thereafter, and shall enter upon the duties of his office on the first Monday of December after his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, and shall be known as the Probate Judge of (name of) county.

SEC. 4. The Probate Judge of each county in which a Probate Court shall be established, shall, before entering upon the duties of his office, take and subscribe and file with the secretary of state the oath required by the Constitution.

SEC. 5. Probate Courts shall have original jurisdiction, in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlement of their accounts, and in all matters relating to apprentices, and in cases of the sale of real estate of deceased persons for the payment of debts; and as soon as such court is organized in any county, the county court in such county shall turn over to the Probate Court all of its probate records and all files, books and papers of every kind, relating to probate matters, in such county court, and all records, files and papers in matters of guardianship and conservators; and the clerk of the Probate Court shall be authorized to demand and receive from the county clerk all such records, files, books and documents, and upon the receipt thereof, the Probate Court shall proceed to finish and complete all unfinished business relating to probate guardianship and conservator matters, in the manner provided by law.

SEC. 6. The terms of the Probate Court shall commence on the third Monday of each month during the year, and shall be always open for the granting of letters testamentary, letters of administration and guardianship, and for the transaction of probate business, and all other matters of which it has jurisdiction, and shall continue open from day to day, until all business before it is disposed of.

SEC. 7. The Probate Court shall have the power to impanel a jury for the trial of issues or matters of fact in any matter or matters pending before the court, and for such purpose the court may, at any time when it becomes necessary to have a jury, direct the clerk of

said court to issue a *venire* for either six or twelve competent jurors and deliver the same to the sheriff or coroner, or any bailiff of the court, who shall summon such jurors from the body of the county to be and appear before said court at any term or day named in such *venire*; and if by reason of non-attendance, challenge or otherwise, said jury shall not be full, the panel may be filled by talesmen. Said court shall have the same power to compel the attendance of jurors and witnesses as the circuit court has or may hereafter have; and jurors to act as such in said courts shall possess the same qualifications, and be entitled to the same privileges of exemption, and subject to the same rules of challenge for cause or peremptorily as jurors in the circuit courts of the state. When such jury shall be brought into said court, the court may retain such jury during the term or any portion thereof, as may be necessary for the trial of any matter or matters of fact, which in the discretion of the court requires a jury. The *per diem* and mileage of said jurors shall be the same as they are for jurors in the circuit court to be paid out of the county treasury, upon the presentation of a certificate of the clerk of said court, issued to each juror at the time of their discharge, certifiying to the number of days he may have attended court as a juror, and the amount of juror fees and mileage due him.

SEC. 8. The process, practice and pleadings in said court shall be the same as those now provided, or which may hereafter be provided for the probate practice, in the county courts of the state; and all laws now in force, or which may hereafter be enacted, concerning wills, or the administration of estates, shall govern and be applicable to the practice in the Probate Courts of the state.

SEC. 9. The sheriff in person, or by his deputy, shall attend the sittings of the Probate Court of his county, preserve order in the same, and execute the legal commands and process thereof.

SEC. 10. Whenever the Probate Judge of any county is interested in the estate of any deceased person, and the letters testamentary, or of administration, shall be grantable in the county of such judge, such estate shall be probated in the County Court of such county, unless the County Judge be also interested, in which event the facts of such interest may be entered of record in the Probate Court of the county, and certified to the Circuit Court of the county, and upon the filing of such certificate with the clerk of the Circuit Court, such court shall have full and complete jurisdiction in all matters pertaining to such estate, under all laws of this state concerning the administration of estates, or the probate of wills; and in all cases so transferred, the clerk of said Circuit Court shall have the same power in all matters of such estate in term-time or vacation, that the clerk of the Probate or County Court has. *Provided*, that if the Probate Judge is only interested as a creditor, no change may be made except in relation to his claim.

SEC. 11. Appeals may be taken from the final orders, judgments and decrees of the Probate Courts to the circuit courts of their respective counties, in all matters, except in proceedings on the application of executors, administrators, guardians and conservators for the sale of real estate, upon the appellant giving bond and security in such amount and upon such condition as the court shall approve, and upon such appeal the case shall be tried *de novo*.

SEC. 12. Appeals and writs of error may be taken and prosecuted from the final orders of the Probate Court to the supreme court in proceedings on the application of executors, administrators, guardians and conservators for the sale of real estate; such appeals and writs of error, when not otherwise provided, shall be taken and prosecuted in the same manner as appeals from, and writs of error to, the circuit court.

SEC. 13. There shall be elected, at the same time as the Probate Judge is elected, a clerk of the Probate Court, who shall hold his office for a term of four years, and until his successor shall be elected and qualified; before entering upon the duties of his office, he shall take and subscribe the oath required by the constitution of the state.

SEC. 14. Every such clerk shall, before entering upon the duties of his office, give bond with two or more sureties, to be approved by the judge of the court in which he is clerk, which bond shall be in such penalty not less than five thousand dollars (5,000), as may be determined by such judge, payable to the people of the State of Illinois, and conditioned for the faithful performance of the duties of his office, and to pay over all moneys that may come to his hands, by virtue of his office, to the parties entitled thereto, and to deliver up to his successor in office all moneys, papers, books, records and other things appertaining to his office, whole, safe and undefaced; which bond shall be copied at large upon the records of the court, and then filed in the office of the secretary of state, upon which such clerk shall be immediately commissioned by the governor and enter upon the duties of his office.

SEC. 15. Every such clerk shall attend in person to the duties of his office when it is practicable so to do, and perform all the duties thereof which can reasonably be performed by one person; *Provided, however*, he may, when necessary, appoint deputies, who shall take the same oath or affirmation as is required of the principal clerk, which shall be entered at large upon the records of the court, and the principal clerk shall in all cases be responsible for the acts or omissions of his deputies.

SEC. 16. Every such clerk shall attend the sessions of their respective courts, issue all process thereof, preserve all the files and papers thereof, make, keep and preserve complete records of all the proceedings and determinations thereof, and do and perform all other duties pertaining to their said offices, as may be required by law, or the rules and orders of their courts respectively; and shall enter of record all judgments, decrees and orders of their respective courts before the final adjournment of the respective terms thereof, or as soon thereafter as practicable.

SEC. 17. It shall be the duty of the county board of every county in which there shall be established a Probate Court in pursuance of this act, to provide the clerk thereof with all necessary blanks, books, stationery, pens and ink, for their respective offices, the same to be paid for out of the county treasury; and in case such supplies should not be so furnished, then the clerk of such court shall furnish the same from time to time as may be necessary, the cost thereof to be allowed by the county board and paid out of the county treasury.

SEC. 18. The necessary rooms, offices and furniture, the proper vaults or other safe means of keeping the archives of their respective offices, shall be provided for the clerks of the Probate Courts in their respective counties, by the county, and the cost thereof paid out of the county treasury.

SEC. 19. It shall be the duty of the probate clerk to deliver over to his successor in office, and of his successor to demand and receive from him, all the books, papers, records and other things appertaining to his office, or in his possession by virtue of his office; and should he refuse or neglect to do so, the court shall have power to use such compulsory process, and take such measures as may be necessary to compel the delivery as aforesaid, according to the true intent and meaning hereof.

SEC. 20. In all matters concerning the probate of

the estates of deceased persons, the granting of letters testamentary or of administration, letters of guardianship, the manner of keeping the records of said court, the form of docket entries, journals, fee books, memorandums, the form of process, the recording of papers and documents, connected with any matter of which said court has jurisdiction; the clerk of said court shall be governed by and follow all laws, now in force, which may hereafter be enacted concerning similar matters in the county courts of the state.

SEC. 21. The clerk of the Probate Court shall charge and collect for each official act, the same fees as are allowed to clerks of the county courts of the state in probate matters, which fees shall be charged in accordance with the laws now in force, or which may hereafter be enacted, concerning fees and salaries, and according to the class to which the county belongs; such clerk shall keep full, true and correct accounts of all fees collected by him, and report the same in accordance with said laws, for the keeping of which accounts no fees shall be allowed such clerk, and the same shall be open for inspection by the county board in accordance with said laws, and all fees in excess of the compensation allowed to such clerk, and necessary clerk hire and other expenses shall be paid into the county treasury, in accordance with said laws concerning fees and salaries.

SEC. 22. Clerks of the Probate Court shall receive such compensation or salary as shall be allowed them by the county board, together with the amount of their necessary clerk hire, stationery, fuel and other expenses, in accordance with the provisions of the constitution: *Provided*, that in the county of Cook the probate clerk shall receive, aside from clerk hire, necessary expenses for fuel and stationery, the sum of three thousand dollars ($3,000) per annum, as his only compensation, to be paid out of the fees of his office.

SEC. 23. Probate judges shall be allowed such salary as shall be fixed by their respective county boards, to be paid out of the county treasury.

SEC. 24. When a vacancy shall occur in the office of Judge of the Probate Court of any county, the clerk of the court in which the vacancy exists shall notify the governor of such vacancy; if the unexpired term of the office made vacant is less than one year at the time the vacancy occurs, the governor shall fill such vacancy by appointment; but if the unexpired term exceeds one year, the governor shall issue a writ of election as in other cases of vacancy to be filled by election.

Approved April 27, 1877.

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" CHARLES DEVENS, JR.,
" OTIS P. LORD,

VALUE OF LAND—SALES OF OTHER LAND.—1. In estimating the value of a lot of land taken for public use, actual sales of similar lands in the vicinity, at or before the time of such taking, are admissible in evidence; and the question whether such other lands are sufficiently like the land taken, and the sales sufficiently near in point of time, to make the evidence competent, is largely within the discretion of the judge. Shattuck v. Stoneham R. R., 6 Allen, 115; Benham v. Dunbar, 103 Mass. 365; Green v. Fall River, 113 Mass. 262. 2. But this discretion is limited, and if this court can see that such sales could afford no just measure of the value of the land taken, an exception will lie to the ruling of the judge, admitting evidence of such sales. Paine v. Boston, 4 Allen, 168; B. & W. R. R. v. O. C. R. R., 3 Allen, 142; Presby v. O. C. R. R., 103 Mass. 1. Opinion by GRAY, C. J.—*Chandler v. Jamaica Pond Co.*

DIVORCE—INVALIDITY OF, WHEN PROCURED IN EVASION OF LAW OF STATE WHERE PARTY IS DOMICILED.—1. Every state has an undoubted right to determine the status of persons domiciled therein. Strader v. Graham, 10 How. 82, 93. No control on the subject of marriage and divorce has beeen conferred by the Constitution upon the National Government; but each state has the power to regulate such matters as between persons domiciled therein. Hopkins v. Hopkins, 3 Mass. 158. 2. When a person domiciled in this state, in evasion of its laws, goes into another state to obtain a divorce for a cause not recognized by our law, this state, by its court or legislature, can declare such divorce of no force within its limits. Hanover v. Turner, 14 Mass, 227; Rev. Stats. c. 76, § 39; Clark v. Clark, 8 Cush. 385; Lyon v. Lyon, 2 Gray, 367; Chase v. Chase, 6 Gray, 157; Smith v. Smith, 13 Gray, 209; Gen. Stats. c. 107, § 54; Ditson v. Ditson, 4 R. I. 87. 3. Sec. 1 of Art. 4 of the United States Constitution prevents any judgment of a court of another state, having jurisdiction of the cause and parties, from being impeached for fraud, or other cause. Christmas v. Russell, 5 Wall. 290; Maxwell v. Stewart, 22 Wall. 77. But when, for any reason, the court has no jurisdiction, the judgment is void, and the recital in its record of the facts, necessary to give jurisdiction, is not conclusive. Thompson v. Whitman, 18 Wall. 457; Knowles v. Gaslight Co., 19 Wall. 58; Carleton v. Bickford, 13 Gray, 591; Folger v. Columbian Ins. Co., 99 Mass. 267. 4. It is competent, therefore, to show that such a decree is in fact void, because procured in evasion of the law of the domicile. Shannon v. Shannon, 4 Allen, 134; Leith v. Leith, 39 N. H. 20; Hoffman v. Hoffman, 46 N. Y. 30; People v. Dowell, 25 Mich. 247. Opinion by GRAY, C. J.—*Sewall v. Sewall.*

CORPORATION—ACT TO SECURE ITS PROPERTY TO CREDITORS—RIGHTS OF CREDITOR HOLDING COLLATERAL SECURITY.—An act, passed for the relief of the defendant corporation and to secure its creditors, provides a mode of determining its liabilities upon all claims enforceable at law, whereby commissioners may be appointed to decide upon such claims, from whose decision an appeal lies to the court. Any other liability is to be defined and established by the supreme court in equity. It also secures the property to the creditors by means of a trust mortgage creating a lien upon it in favor of all creditors to whom certificates have been issued by the commissioners, upon proof of their claims in the manner pointed out by the act. The petitioner held a promissory note of the defendant, and as collateral three other notes of defendant, pay able in ten years from date, with interest coupons annexed, said latter notes being regularly quoted in the market. A decree was asked for, by which petitioner might receive certificates for both the principal debt and the security, or be allowed to sell the security and take a certificate for the balance, after applying the proceeds to the payment of the debt. *Held*, that the petitioner was not entitled to the decree asked for. The purpose of the act is to give all the creditors an equal participation in the security afforded by the mortgage. To this end, existing liabilities are extinguished and a new liability created by the issuance of certificates. The creditor is not compelled to come in under this act and take his certificate; but if he does, he must do so on terms of equality with the rest. He can not, directly or indirectly, be allowed double proof for the same debt, nor transfer his contracts so as to give different persons the right to full proof of each. A debtor's liability, where other creditors are concerned, is not increased by increasing the number of his promises to pay the same debt. Royal Bank of Liverpool v. Grand Junction Ry. Co., 100 Mass. 444, is not in conflict. That was an action at law upon cer tain bonds, and the defense was, that part of the bonds were security; and it was held unavailing, because a seal imports a good consideration, and the holder could maintain an action if the delivery had been gratuitous. *In re* Regents' Canal Co., 3 Ch. D. 43, was a case where a creditor held the debentures of his debtor secured by mortgage as security for debt of less amount, and the company being in liquidation, he was properly allowed to prove all his debentures *pari passu* with the other debenture holders, because otherwise he could not reach his share of the property mortgaged, as to which he had priority over other creditors. In Morris Canal Co. v. Fisher, 1 Stockton, 667, as in the English cases, the bonds were part of a limited amount secured by mortgage, and the transaction operated to give the creditor the benefit of the mortgage security. See *In re* Xeres Wine Shipping Co., L. R. 3 Ch. 771. The petitioner is allowed single proof of his debt only. Opinion by COLT, J.—*Third National Bank v. Eastern Railroad.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

September Term, 1876.

[Filed Jan. 31, 1877].

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" PINCKNEY H. WALKER,
" ALFRED M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" T. LYLE DICKEY, } Associate Justices.

INSURANCE—WITNESS TO PROVE VALUE OF BUILDING DESTROYED — REPRESENTATIONS OF AGENT — FRAUDULENT MORTGAGE—INSURABLE INTEREST.—1. Any person acquainted with property such as a dwelling house, and its value or the value of like property, is a competent witness to prove its worth, in a suit to recover for its loss against an insurance company. 2. If a policy of insurance refers to a written application, which is not signed by the assured, but by an agent of the company, and it is not shown that the assured authorized it to be made, or ratified the same after its execution, he will not be bound by any representations therein, if they should prove to be false; nor will the fact that it fails to disclose the title prevent a recovery for a loss. 3. A condition in an insurance policy, making an application referred to a part of the contract and a warranty by the assured, and declaring that any false representation by the assured as to the condition, etc., of the property insured, or any omission to make known every fact material to the risk, or if the interest of the assured be not truly stated in the policy, the same shall be void, can not be said to have been violated when the assured has made no written application. 4. If an insurance policy provides that if the interest of the assured be any other than the entire, unconditional and sole ownership for his own use and benefit, or if the building stands on leased ground, it must be so represented to the company and so expressed in the written part of the policy, otherwise the same shall be void, and the assured states such facts to the agent, but they are not inserted in the policy, either by accident or design, such omission will not defeat a recovery in case of a loss. 5. A party applying for insurance on property is not bound to disclose the existence of a mortgage thereon which has been paid, or one which is invalid by reason of its execution having been obtained by fraud and circumvention. 6. A mortgagee's power to sell only continues as long as the debt survives. When the debt is extinguished, the power to sell ceases, and an attempt to exercise it is therefore *ultra vires*, and transfers no title, unless the mortgagor so acts as to estop him from showing the facts. 7. The principal thing in an insurance is, that the assured has an insurable interest, and has acted in good faith. Under a statement that he is the owner, he is only bound to prove an insurable interest, which is such a title as, if there should be a loss without insurance, it would fall on him. A mortgagor has such an interest. 8. The refusal of instructions not pertinent to the issues, or of such as, when proper, announced principles that have been given in others, is not error. Opinion by WALKER, J.—*Lycoming Ins. Co. v. Jackson.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF TENNESSEE.

April Term, 1877.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY,
" THOMAS J. FREEMAN,
" ROBERT MCFARLAND,
" J. L. T. SNEED, } Justices.

TESTAMENTARY TRUSTEE—BOND.—Sec. 1974 of the Code of Tennessee, providing that "Every trustee or assignee, to whom property exceeding the value of five hundred dollars is conveyed in trust for the benefit of creditors, sureties or other persons," unless by them released in writing, shall give bond for the faithful discharge of all duties imposed on him by law and by the terms of the deed or assignment, and shall make oath before the clerk of the county court for the faithful performance of the same and other specified duties, has no application to a testamentary trust for the benefit of designated legatees. Opinion by FREEMAN, J.—*Kerr v. White.*

CHANCERY PRACTICE—SURETY ACCOUNT.—1. A bill for an account, brought by wards of a deceased guardian against the surety on the guardian's bond, may be maintained without making the representatives of the deceased guardian parties, his estate being insolvent. [Citing Story's Eq. Pl. § 169; 1 Dan. Ch. Pr., 4th Am. Ed., pp. 270 271.] 2. The code, making all parties to joint obligations liable severally, applies to such a case. [Citing Foster v. Maxey, 6 Yerg. 224.] Opinion by SNEED, J.—*Parker's Heirs v. Irby.*

CRIMINAL PRACTICE—EVIDENCE.—Testimony elicited by the state from a witness, if found unexpectedly to contradict and discredit another of the state's witnesses, can not be withdrawn from the jury on the application of the state, over the objection of the defendant. Opinion by FREEMAN, J.—*Logan v. The State.*

SUBROGATION—LIEN.—The heirs of W, supposing his estate amply solvent, paid off certain of his debts; but the estate afterwards proving insolvent, the heirs then claimed by subrogation not only the debts, but also the liens of such debts on the lands of the estate, and priority of payment out of the proceeds of such lands when sold. *Held*, as to judgments, the lien of which was gone by the lapse of a year without execution levied, when the payment was made, the heirs acquired no lien, being subrogated merely to such rights as the creditors had. [Citing 1 Story Eq. Jur. § 562: Mitchell v. Mitchell, 8 Humph. 361.] *Held*, as to deeds in trust, which the heirs took up, securing additional time, and giving instead new deeds of trust, in which new trustees were named, no intent appearing at the time of payment to continue the debts and seek subrogation as lien creditors, the liens were discharged and the purchasing heirs were entitled to prove such debts as creditors merely. [Citing 1 Lead. Cas. in Eq. 155; Starr v. Ellis, 6 Johns. Ch. 396; Gardner v. Astor, 3 Johns. Ch. 55.] Opinion by FREEMAN, J.—*Belcher v. Wickersham.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE,
" WM. P. LYON, } Associate Justices.

MORTGAGE FORECLOSURE—VALUE OF PROPERTY.—In a mortgage foreclosure, where the land has been conveyed since the mortgage to a railroad company for the use of its road, its value (for the purpose of determining the rights of the company, under sections 16 and 21, chapter 119, Laws of 1872), must be estimated *as it was when the company acquired the title*, without improvements made by the company; and if its actual market value was *then* enhanced by the projected and prospective construction of the company's road, it must be estimated at such enhanced value. Opinion by LYON, J.—*Aspinwall v. C. & N. W. R. R. Co., imp.*

CRIMINAL LAW—EVIDENCE—CHARGE TO JURY.—1. One accused of crime is entitled to have the evidence against him closely and carefully scrutinized, and can be lawfully convicted only where, after such scrutiny, the jury can say, upon their oaths, that the evidence leaves in their minds no reasonable doubt of his guilt. 2. On the trial of a criminal information, the jury were thus instructed: "In order to convict, the evidence should be such as to convince you as reasonable men that the charge is true. If, as reasonable men, *guided by that prudence and reason which govern you in the ordinary conduct of your affairs*, you have a doubt of the defendant's guilt, you should acquit." *Held*, that this language might, without violence, have been understood by the jury to mean that if, in their ordinary affairs, they would, upon the evidence before them, adopt and act upon the hypothesis that the accused was guilty of the crime charged, they should convict him; and that, so understood, the instruction would have exposed the accused to conviction on insufficient evidence; and it was therfore erroneous. Opinion by LYON, J.—*Anderson v. The State.*